



Journal of the Senate

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SITTING AS COURT OF IMPEACHMENT

The Senate, sitting as a court for the trial of Articles of Impeachment against the Honorable Samuel S. Smith, Circuit Court Judge of the Third Judicial Circuit of the State of Florida, convened at 9:00 a.m. pursuant to the motion by Senator Pat Thomas on May 12.

The Chief Justice presiding

The Managers on the part of the House of Representatives, Honorable William J. Rish, Honorable H. Lee Moffitt and Honorable Ronald R. Richmond and their counsel, Honorable Marc H. Glick were present.

The respondent, Honorable Samuel S. Smith, and his counsel, Honorable Joseph Jacobs, were present.

The following Senators were recorded present—36:

Barron	Gorman	Myers	Spicola
Brantley	Graham	Peterson	Thomas, Pat
Chamberlin	Hair	Plante	Tobiassen
Childers, Don	Henderson	Poston	Trask
Childers, W. D.	Holloway	Renick	Vogt
Dunn	Johnston	Saylor	Ware
Gallen	Lewis	Scarborough	Williamson
Glisson	MacKay	Scott	Wilson
Gordon	McClain	Skinner	Zinkil

Excused: Senators Castor, Firestone, Jon Thomas and Winn; Senator Trask at 1:30 p.m.

THE SECRETARY: A quorum is present.

MR. CHIEF JUSTICE: The record will so reflect.

Senators, the Senate of the State of Florida is now sitting as a Court of Impeachment for the trial of Samuel S. Smith and is hereby called to order pursuant to the order of this Court of Impeachment entered on May 12th, 1978. And the stipulation of counsel is called to order for the purpose of considering motions on questions of jurisdiction and law and other matters that may be properly brought before the Court on this day.

The Senate President has directed the Sergeant at Arms to insure that only authorized persons are on the floor. I ask that that be complied with.

As he mentioned to you, all the testimony is not being presented in this portion of the proceedings. I do request that you remain at your desk the same as a judge does in a court or a jury does in those particular proceedings where argument is presented and recesses will be declared the same as they are in a court proceeding.

You have received on your desk a desk book. This desk book contains the Articles of Impeachment and contains the motions now before this Court. Exhibits have been stipulated to by counsel for the Board of Managers and the counsel for the Respondent in this proceeding and they are in the thick yellow bound book on your desk with what have been delivered to you.

Briefs have been submitted to you by both the Respondent and the Board of Managers and they look like this (indicating.)

The Chair requests that the Board of Managers and their representatives identify themselves for the record.

REPRESENTATIVE RISH: I am Representative Billy Joe Rish and with me is Representative Moffitt and Representative Richmond and our counsel is Mr. Marc Glick.

MR. CHIEF JUSTICE: The record will so reflect. The Chair requests that counsel for the Respondent identify themselves for the proceedings.

MR. JACOBS: My name is Joseph C. Jacobs. I represent the Respondent under the limited appearance that was previously filed here.

MR. CHIEF JUSTICE: All right. The record will reflect that the Respondent is also present before the Court of Impeachment on this day.

Mr. Secretary, I feel that it's appropriate at this time to read the Articles of Impeachment unless it is waived by counsel for the parties.

MR. JACOBS: If it please the Court, if the Court has no objection or opposing counsel, I would join in a waiver of the reading of the rules.

MR. CHIEF JUSTICE: Let me ask, I think it would be appropriate that if the House would use the microphone of Mr. Hair and if the Respondent will use the microphone of Senator Dunn that then the record will be clear and everybody can hear what is going on.

Counsel asked for the Respondent, as I understand it—Mr. Jacobs, would you state it again?

MR. JACOBS: Yes, I would move that the Court do waive the formal reading of the Articles of Impeachment.

MR. CHIEF JUSTICE: All right.

REPRESENTATIVE RISH: That's fine.

MR. CHIEF JUSTICE: Members of the Senate, the Articles of Impeachment are contained at Page 12 of your desk book. I am going to agree to the waiver of the reading of those Articles of Impeachment but they will be, I assume, referred to in argument of counsel that are presented to you so I ask that you know where they are and so that you can refer to them easily.

Mr. Jacobs, do you desire the Secretary of the Senate to read the motion filed by the Respondent on the date of May 18, 1978?

MR. JACOBS: It is my understanding that that document and the others have been placed on the desk of the individual Senators and that they have had an opportunity to review them and I certainly would waive the formal reading of those documents to the Senators.

MR. CHIEF JUSTICE: Does the House have any objection to the waiver of the reading of the motion?

REPRESENTATIVE RISH: No.

MR. CHIEF JUSTICE: Senators, the motion is at Page 36 of your desk book. Let me now explain to you how this motion that appears at Page 36 of the desk book will be presented to you.

Each side will have a total time of 45 minutes to present their argument. The Respondent as the Movant will open and have an opportunity to reserve as much time as he desires for the matter of rebuttal.

The Board of Managers representing the House of Representatives will make their presentation to you following opening arguments by the Respondent. To allow them to fully make their presentation to you I would ask that you refrain from asking questions until the conclusion of arguments for both sides. At that time, I will allow you to ask questions first to counsel for the Respondent and second to counsel for the Board of Managers.

Upon conclusion of the argument and before your discussion among yourselves or as a body, I will give you my views of the law and following that you will determine to grant or deny the motion to dismiss that has been filed by the Respondent.

At this time the Chair will recognize the Respondent for his argument on the motion. As I understand it, it will be here at the well, here where Secretary Brown now stands.

MR. JACOBS: Mr. Chief Justice, Mr. President, Mr. Secretary, members of the High Court of Impeachment. I think a few preliminary statements would be in order. I know it has been suggested that the limited appearance and my refusal to represent Mr. Smith in this matter has been suggested that it was some kind of a ploy or some kind of—sought to get advantage for my client. That's certainly not true. But we earnestly requested that Mr. Smith be afforded counsel as he was in the District Court for the Northern District of Florida and as—under the finding of indigency by the Special Committee of the House of Representatives.

The person who will represent him in this capacity will have a heavy, heavy burden. I have discussed it with counsel for Mr. Smith in the trial in Jacksonville which I understand the transcript is some 5,000 pages and took several weeks to try.

I discussed it as late as last night with Mr. Bretcher who is the court-appointed counsel for Mr. Smith, the Respondent, in this case pending in the Northern District and being tried in New Orleans. The State has just completed its part of the trial. He estimated that the six Defendants would require two months to present their side of the case and they will do so. He estimated that he would spend one month on the Respondent's reply and proofs and that the remainder, the other four Defendants, would use about the same amount of time that he does.

Therefore the person who assumes the responsibility for representation here will be required to examine the 5,000 pages of testimony in Jacksonville, will be required, if he does his job at all, to interview the key witnesses that appeared there. He will have to review the documentary evidence which I understand is tremendous that was used in and is being used in the trial in New Orleans. He will have to review the testimony of the witnesses there in preparation—

MR. CHIEF JUSTICE: Mr. Jacobs, I will call for an issue on the matter of counsel but I think this issue at this stage, as I understood was being presented, was going to the jurisdiction of this impeachment court to proceed on the merits.

MR. JACOBS: Thank you, Your Honor.

MR. CHIEF JUSTICE: I think that it's probably better that we address that issue before we get to the matter of counsel.

MR. JACOBS: Thank you, Your Honor, I will go directly then to the question of law that is presented here. The threshold question, of course, is whether or not the Respondent is a public official liable to impeachment. He was convicted of a felony by a trial court. He was suspended from office without pay by the Supreme Court of Florida. He has resigned effectively immediately and without reservation and it is argued is not liable to impeachment.

Now the House Managers in their very able brief made the point and they present the hypothesis that a private citizen may be impeached, that there is no requirement that he be a public officer. I respectfully disagree with that conclusion.

Article III, Section 17 which has, as I view it, is the sole power of this body to try and the sole power of the House of Representatives to impeach, is couched in language that is so absolutely clear that it is not susceptible to debate, that the power of impeachment is limited to public officials.

I read selected portions of the Article III, Section 17:

"The Governor and others . . . judges of circuit courts shall be liable to impeachment for misdemeanors in office. The House of Representatives by two-thirds vote shall have the power to impeach an officer. The Speaker of the House of Representatives shall have the power at any time to appoint a committee to investigate charges against any officer subject to impeachment. An officer impeached by the House of Representatives shall be disqualified from performing any official duties until acquitted by the Senate . . ." so forth.

Skipping down: "No officer shall be convicted without the concurrence of two-thirds of the members of the Senate present. Judgment of conviction in case of impeachment shall remove the offender from office and in the discretion of the Senate may include disqualification to hold any office or trust, of honor, trust or profit. Conviction or acquittal shall not affect the civil or criminal responsibility of the officer."

I have emphasized the main references to officer which I think conclusively demonstrates that you must make a determination that the Respondent was an officer as a condition precedent to proceeding with his impeachment.

Now we next come to the key and perplexing question and I wish, in fact the members of this Court who are lawyers know that we love to have direct authority that we can cite to our courts and can be of assistance to the court because we are officers of the court and I as well as the members of this Court fully recognize the responsibilities that we jointly have here and I recognize my responsibilities as well.

However, the courts have not given us the guideline that we would like to have. I have to report to you that the case law is not clear, absolutely not clear. I will go into it very briefly with you.

In 1918 in *State ex rel Jackson versus Crawford* the Supreme Court held that the acceptance by the Governor of a resignation of a suspended officer was what created a vacancy in the office. Then in 1934 in an advisory opinion the Court said that this case stood for the proposition that a resignation to take effect at a subsequent date the office did not become vacant until the date on which the resignation became effective.

Now come the two cases which really give you trouble in reaching the decision that you must make. Because in 1938 in a case *State ex rel Landis versus Heaton* the proposition is clearly stated that the resignation coupled with abandonment

of office is effective without regard to the acceptance or rejection thereof by the Governor. Clearly, unequivocally.

At that point if I could stop I could advise you and I'm sure that the Chief Justice could advise you in serving his responsibility; the question is clear. It did not stop there.

The next year in 1939 the Supreme Court of Florida rendered another opinion saying exactly, virtually exactly the opposite. They said that resignation becomes effective only when it is accepted by the Governor.

The second case, the 1939 case, *State ex rel Gibbs versus Lunsford*, makes no mention of the 1938 case, does not purposefully or intentionally disregard it; it just doesn't mention it. Many of us have examined the membership of the Court in the two separate instances and we find people that sat on both cases and there is no explanation that I can give you as to why in 1939 they didn't at least mention the 1938 opinion.

Then we have the case, *Judge Ervin case, State ex rel Spector versus Glisson* in which in dicta, and I admit it's dicta, the Court said they recognized the fact that early on in the trial of the case the question had been before them concerning the acceptance of the resignation of Judge Ervin by the Governor and they said that they recognized the fact that it had been ultimately accepted and therefore that would not be a controlling factor and they used the words, and I'll let you read the case for yourself as I know you already have, because it said, "... which might not have been effective, in any event."

At common law it must be remembered that a private citizen was subject to impeachment. At common law it appears that a public official did not have the absolute right to resign his public office. The cases are legion that support both sides. I have the Alabama case which was referred to by the Court in the 1938 opinion which supports my side of the argument. They cite in the opinion California, Indiana, Iowa, Nebraska, Nevada, New York, Ohio, Missouri and Federal cases that support the proposition that no acceptance of the resignation is necessary. My research since then has found Colorado, Wisconsin, Illinois, Pacific, I don't know which state that was, New York supplement, Pacific again, et cetera. So there are legion of cases standing for the proposition that a resignation need not be accepted in order to be binding and effective.

There are also cases and I hasten to add and well reasoned, apparently well reasoned cases, that support the proposition that the Governor must as a condition precedent to a resignation becoming effective accept that resignation.

Now of course I vigorously argue, I vigorously argue, that the—first as to the common law.

The common law under Chapter 2.01 Florida Statutes was determined to be effective in the State of Florida until some action was taken and therefore I would argue that in 1938 that the Court effectively stated the law of this state to be different from the common law and that the determination was that a resignation did not have to be accepted by the Governor. In 1939, what effect that opinion has, my research does not reveal what occurs when the common law is abrogated by case law and then is abrogated back by a subsequent case law. Hopefully your research will find something in this regard.

In any event, we argue that the better reasoned authority, obviously there are two existing Supreme Court decisions reaching exactly opposite conclusions and therefore this body sitting as a Court of Impeachment may reach the conclusion which is the better reason, which is the better public policy of the State of Florida, which is the better reasoned position to follow. These points are argued in the brief.

Number one, history. In 1871 Judge Magbee resigned his office and the House Managers moved that the impeachment that was pending before him be dissolved which motion was granted.

In 1897 Treasurer Collins resigned and the House of Representatives withdrew the Articles of Impeachment and notified the Senate of that action.

In April 1974 a Select Committee of the House discontinued further action against Floyd T. Christian when he resigned from office.

In 1975 Tom O'Malley resigned from office as Treasurer and the Articles of Impeachment against him were dissolved.

In 1975 the Select Committee of the House discontinued activities on the resignation of Justices Dekle and McCain.

Thus it is found from a historical standpoint that no officer in the State of Florida has to this date been impeached after his resignation.

Impeachment in the United States. The two key matters and these are before you in the briefs, are the Blount and the Belknap impeachments.

In Blount the question was squarely raised and was sustained by a vote of 14 to 11 that Blount was not subject to impeachment because he was no longer a member of the Senate at the time of the trial. Now Belknap is, and I'm sure opposing counsel will spend a considerable amount of time on Belknap because Belknap is the closest thing that I have found to an authority to support the proposition that a private citizen may be subject to impeachment.

In that case Mr. Belknap at the time of the acts involved was Secretary of War. He later served in other capacities but was not a member of—was not a public official at the time that the charges were brought. However he was impeached, let me hasten to say. Twenty-five people voted that they did not have jurisdiction. Then when it came to the merits the same 25 people voted again, many of them stating that the reason that they did was because they did not have jurisdiction. And therefore by a vote of 37 to—between 37 and 35 to a vote of 25 the two-thirds required was not reached and therefore he was not convicted. But that is the closest thing that I have found to impeachment of a public official.

Now the difference as I see it is the difference between the constitution and the statute-114 subsection (d) which became effective on June the 16th, 1977 says, among other things, that upon the resignation of the officer and acceptance thereof by the Governor a vacancy occurs-114 (d). Now that is absolutely and directly and completely contrary to the constitutional provisions.

Article III—Article X, Section 3 which defines a vacancy in office that it shall occur upon, among other things, resignation with no mention of acceptance thereof by the Governor.

We would argue that the placing of the additional requirement in the statute which is not in the constitution is an invalid act because the courts have held when the constitution provides the manner in which a particular act shall be performed it prohibits the act from being performed in any other way.

Stated another way if we construe the statute and construe the constitution to authorize the Governor to accept or reject a resignation, what are the standards by which his conduct will be measured? The courts have uniformly held that it is entirely proper for the Legislature to pass law and in addition

to passing laws, to allow the Governor, boards and agencies, public officials, to perform certain acts. But they must do so within the guidelines laid down by the Legislature. Here the Governor's letter purporting to not accept the Respondent's resignation says in part:

"I do not accept your resignation due to the measure of the criminal pending cases and the fact that any executive action at this time might preclude the appropriate State response to the outcome of these proceedings."

If the Governor, chief executive of the State, I'm not speaking of the present incumbent in that office, I'm talking about the office, the power of the office, if the Governor has the power to write that letter and continue the Respondent in office so that he may be subject to impeachment, then he has the power to write this letter:

"I do hereby accept your resignation due to the insignificant nature of the pending criminal cases and the fact that my acceptance of your proffered resignation would preclude action some might feel to be appropriate State response to the possible outcome of these proceedings."

Let us assume that he wrote two letters, one to one former judge and one to another former judge exactly the opposite. By what standard is his conduct measured? I respectfully suggest to you and one of the people that I revere and I know many people in this body do, one of the last and outstanding opinions rendered by former Circuit Judge Hugh M. Taylor in the case of *Lewis versus Bank of Pasco County* which was affirmed by the Supreme Court, let me say, was concerning the statute which authorized the Comptroller to release information about bank records. It was argued that there was no standard by which you would measure the Comptroller's conduct and Judge Taylor ruled and the Supreme Court said there are no restrictions, limitations or guidelines provided in the statute to limit or regulate the action of the Department in granting or withholding consent to the news media inspecting, copying and publishing any information in a bank's records.

As the statute is written the Department may release the financial statements of some borrowers, the bank accounts of others and the stockholdings of others entirely at the whim or caprice of the Comptroller. The fact that as of the present time the Comptroller has attempted to exercise such authority only as to the stockholdings in banks is immaterial. The validity of the power sought to be divested in the Comptroller must be measured by the scope of the grant of the power, not to the extent to which it has been exercised.

The cases, we respectfully suggest, are squarely on point and the cases are legion, stand for the proposition that when a power is delegated to an official it must be accompanied by standards by which the public official's conduct may be measured.

The examples that leap to your mind and the examples that leap to mine of potential misuse of this power by an irresponsible chief executive are legion. It seems to me that the State House Managers in their brief are saying that this body has the authority to impeach former public officials at any time and it is actually in the brief as long as the person lives. They cite the *Belknap* case which, and it's in the brief, where the questions are raised squarely to them because they said what about the present President of the United States who used to be the head of the Philippines and who before that was serving in another public capacity and at what time does his susceptibility to impeachment stop?

And they said when he quits breathing. And I think under the constitution and under the laws of the State, although I

hasten to admit that there is authority to support the contrary conclusion, the better reason, the only standard which we can hold is that a public official like all other men in this country has the right to unilaterally resign his office and that the power, statutory powers even to the Governor to accept it is a ministerial act only and that he accepts it, sure that it's in order and that it's properly filed and it's to let him know that he will have to fill a vacancy in a short period of time.

To say otherwise is to, in my judgment, and I hope in the judgment of this body, to place public officials in the future susceptible to action which may not be in the public interest.

Now what is the line of demarcation, what is the measure by which we measure the power of this body which is awesome, which is almost absolute, which is almost complete? How do we measure, by what standard do we place it? And I have suggested in the brief *State ex rel Hardy versus Coleman* which I think is the closest case to the proposition that we have before us. That concerned the removal of the sheriff, the suspension and removal of a sheriff by the Governor and the subsequent action by the Senate and the question was raised and Mr. Justice Terrell speaking for the Supreme Court, I think, laid down the line between this body's all-encompassing power and the power of the Court.

Speaking of the power of the Governor to suspend and the Senate to remove a public official, the Supreme Court in 1934 stated the respective authority as follows:

"The power of the Governor to suspend and of the Governor and the Senate to remove is not an arbitrary one. Both are guarded by constitutional limitations which should be strictly followed. It has been charged that this is an unusual power to vest in the Governor and the Senate. So it is but the people have lodged it there. The position of Governor and Senator is one vested with great dignity and responsibility and we are not to presume that these places will be filled by the people with men who do not measure up to the responsibility imposed in them. At any rate, the duty imposed should be exercised with great care and caution because when done the result is final and no other power is authorized to intervene.

"We therefore conclude that this court—" speaking of the Supreme Court—"is authorized to determine the sufficiency of the judicial jurisdictional facts on which the Governor rests any suspension under Section 35 of Article IV of the constitution but we have no authority to determine the sufficiency of the evidence to support the grounds of such suspension, that being solely the function of the Senate under such rules as it may prescribe."

In addition I would argue that the attempted penalty of the loss of the pension rights by the statute is invalid in that it is squarely contrary to the constitutional penalties that follow upon a conviction under an impeachment. Article III, Section 17(c) provides judgment of conviction in cases of impeachment shall remove the offender from office and in the discretion of the Senate may include disqualification to hold any office of honor, trust or profit. Conviction or acquittal shall not effect the civil or criminal responsibility of the officer.

Now the statute, of course, provides 121.091(5)(g), any elected official who is convicted by the Senate of an impeachable offense shall forfeit all rights and benefits under this chapter except the return of his accumulated contributions as of the date of his conviction.

The statute is controlling, I respectfully suggest—the constitution is controlling and it is absolutely contrary to the statute. It adds a new punishment, the constitution providing the

manner in which punishment shall be levied. It has prohibited any other punishment by like title.

Do I have any time left, Mr. Chief Justice?

MR. CHIEF JUSTICE: You have used 33 minutes.

MR. JACOBS: Thank you. I would like to reserve the remainder of my time for rebuttal. Thank you, sir.

MR. CHIEF JUSTICE: The impeachment court will now recognize Representative Rish representing the House Managers.

REPRESENTATIVE RISH: Mr. Chief Justice, Mr. Jacobs, ladies and gentlemen of the Senate sitting as a Court of Impeachment. We are here today primarily on three questions raised by Respondent.

One, that he has resigned; one, that he has retired; one, that he has been convicted. The other points which were not argued by Mr. Jacobs dealt with due process of law and we will only lightly touch on those later.

We are here on a jurisdictional question this morning. We are not here on the guilt or innocence of anyone but here only on the proposition as to where is your jurisdiction and where does it lie and should you or do you have the authority to look at this matter? We would submit to you that as to the conviction argument that the law of Florida is replete with authority that until a conviction is final that this does not leave a vacancy.

I would tell you as a matter of record that Judge Smith is vigorously appealing that conviction in the Fifth Circuit Court of Appeals in New Orleans. That appeal has not been ruled on.

Now it's true that presumptions change, the presumption of innocence which a Defendant brings into a courtroom with him vanishes when the jury reaches that verdict. But it is not final until he exhausts all of his appeals and those have not been done.

I would like to state briefly the law of Florida to you as found in one of our cases in the opinion, and this is found on Page 26 of the brief, if you would like to look at it, 26 of our brief:

"While an officer may be suspended from office for the commission of a felony, the office is not deemed vacant under Section 298 of the general statutes except upon conviction and a conviction is not operative while a supersedeas is effective."

So that settles the law with regard to conviction, the conviction in and of itself does not at this time create a vacancy in office.

Let's look for just a few moments in trying to reach the question of your sole jurisdiction as to whether or not you should find jurisdiction based upon the fact that there has been a proported resignation.

Mr. Jacobs and I have found about the same cases but I would like to go into for you just a little bit the two leading Florida cases that Mr. Jacobs mentioned to us.

In 1938 the Heaton case, let me tell you what it involved, the actual facts of the case. The law at that time said that you couldn't have more than one representative from labor and one representative from management on the old Florida Industrial Board, by whatever name it might have been then called. Through some manner the chief executive had appointed Mr. Heaton and Mr. Britton, both clearly representatives of labor, to that Board which is contrary to the law. Now this was raised by the Attorney General or someone but when this was apparently found out Mr. Heaton went and got him a job

teaching school in Pensacola and that's where he was when the lawsuit was brought.

The court said, look, he not only resigned as he had submitted the formal resignation to the Governor though it had never been formally acted on, he completely abandoned that office, he is teaching school in Pensacola and of course he is not holding office and that office is vacant and another person should be appointed. So I think we need to know the facts under which the court was operating, the constraints under which it was operating in the Heaton case. To reach a different result would have been foolish in that case. But they made remarks in that case, dicta, as Mr. Jacobs pointed out, which would have been in support of his version. But I want you to know the facts leading to that.

The case that bothered Mr. Jacobs, I believe considerably, was the Lunsford case. Mr. Barron, a Bay County case. Some 20 months later in which a constable in Bay County was suspended by the Governor. Another person was appointed to hold that vacancy during the suspension until it was acted upon by the Senate or otherwise was handled but as sometimes happens in politics in Florida, some of our friends got together on November the 7th and said, hey, there is an election tomorrow and since a resignation would create a vacancy and write-in ballots are permitted in this state, let's get old Lunsford—I mean Mr. Caswell to resign and then we will run us a write-in candidate tomorrow and we will have the constable we want rather than the one the Governor is giving us.

Well, on November the 7th Mr. Caswell wrote a letter of resignation, sent it to the Governor and said I resign effective this date, November the 7th.

On November the 9th, I don't know whether it was the same mail service we have today or not but it took two days before the Governor got that resignation apparently on his desk, at least two days before he wrote on it, "Accepted November the 9th." The intervening November the 8th had seen quite a little election going on in Bay County with write-in ballots. The old home town boys did what they wanted to do except the court said no, there wasn't a vacancy November the 8th because the Governor had not accepted that resignation. Therefore the previous appointment he made will continue to run until the Senate, until the Senate acts upon it or some other branch of government acts upon it.

Now let me tell you something that was said in that case and this is the crux of our argument and your jurisdiction. I'm quoting from Page 15 of our brief now from the Lunsford case. This is what the Court said at 192 So. at 487 and 488:

"The right to resign will be denied especially where the resignation is hastily made for the purpose of affording litigation."

Now let me tell you what else happened in the Lunsford case. Mr. Jacobs is completely right, a hundred percent correct and honest in the fact that the Court did not mention the case of a year and a half earlier, the Heaton case, but let me tell you what the Court did in the Lunsford case.

It had adopted the Alabama minority view in Heaton a year and a half before but specifically found that to be the minority view and the poorer view and subscribed to the old common law theory which Florida had subscribed to before and adopted once and for all for Florida the common law of England, the statutes as written now and as interpreted by the courts but Florida was in the majority view, that quoted from 24 jurisdictions and said that in Florida the law of this state is that a resignation is effective when it's accepted by the proper authority and that's especially true of the law of Florida, they

said, when the attempt to resign is for some purpose to avoid prosecution, impeachment or other matters. And that's the law of the State of Florida with regard to the Lunsford case.

Now the Spector case did have some dicta which said that it might not have been controlling but I want you to remember that in the Spector case the Governor, prior to the ruling of the case, accepted that resignation. There is another case that was not a matter of impeachment but was a matter of suspension by the Court and that was Judge Lamont case which was later even than Spector.

Now in Judge Lamont's case the Court had this matter before it, issued its order of removal but before it became final Judge Lamont unconditionally resigned. The Court did not acknowledge that resignation, it continued to remove him from office.

The Federal cases which have been mentioned—well, I might say that the counsel made much to do about the difference between the constitution and the statute which we have passed with regard to acceptance of it. But in the Greater Loretta case which is found on Page 24 of your brief, let me tell you about the Legislature adding some language to a constitutional provision if all it's doing is explaining or making clear what the case law has always been.

On Page 24 of our brief, from the Greater Loretta Improvement Association case, the Court said:

"Where a constitutional provision may well have either of several meanings, either of several meanings, it is a fundamental rule of constitutional construction that if the Legislature had by statute adopted one its action in this respect is well-nigh, if not completely, controlled."

So we would tell you that there is no conflict there that bothers us because that statute merely added resignation and then when accepted by the Governor.

In the Blount case which was a Federal case it held—now that man had not resigned; he had been removed, a United States Senator from Tennessee. He had been removed by the Senate already but the proposition that it stood for was that a man might face impeachment and resignation or removal from office would not keep him from suffering whatever other punishments might be.

Now in the Blount case it said that a party cannot benefit from his own wrongdoing. Significantly there was discussion about whether or not Blount could escape impeachment by resigning. But his lawyer said, listen to this:

"It is among the less objections of the cause that the defendant is now out of office and not by resignation."

Now this was Senator Blount's lawyer arguing the case:

"I certainly shall never contend that an officer may first commit an offense and afterwards avoid punishment by resigning his office." That was the argument that he made in the Blount case.

The Belknap case, a very clear case, the Senate did not convict and that's another matter. We're not here this morning about what you think is the merits of this impeachment matter but really on the jurisdiction. In the Belknap case the day that the House or a few hours before the House voted out the Articles of Impeachment, Mr. Belknap went to the President with his resignation and said, I want to quit, I'm in hot water. The President accepted the resignation, the House said it doesn't bother us. They voted out Articles of Impeachment. The Senate said it doesn't bother us, at least a majority of them. They went ahead and tried the man and always fell from five to seven votes short of the two-thirds requisite to do it. I don't know whether it was on jurisdiction or not.

Mr. Jacobs properly pointed out that there were always some 24 or 5 votes in opposition to it and that had been roughly the ones that voted against the jurisdictional matter. But it surely stands for the proposition that so far as your jurisdiction is concerned, resignation, valid or invalid, makes no difference.

Now let me say to you that we have been talking about whether or not the resignation, attempted resignation, valid resignation, invalid resignation, will stop you from jurisdiction, and we submit to you that it does not.

First of all it's our position that he has not resigned effectively under the laws of Florida.

Secondly, under these two Federal cases that we have just shown you we will tell you that it wouldn't make any difference. There is another Federal case, the English case, with a Federal judge where the same proposition was held that resignation made no difference.

In *Maddox v. Ferguson* dealing with a former Governor of Texas there is a clear argument made that resignation makes no difference and this man was being—a case was cited six years after he had been impeached.

So it is our position that Judge Smith has not effectively resigned but we can tell you that the law of Florida and the law of the United States is that if he had effectively resigned he still could be impeached if you saw fit. Because it's a two-edged sword; one is to remove a man from office forever and another to keep him from ever holding any office of public trust in the future.

We would submit to you further that the conviction is not final. We would submit to you that on the matter of the retirement which he raises that it may look like a bucket of worms at first blush but I would tell you that if you will get one end of it and pull it out, gentlemen, and ladies, that is nothing more than one great big long worm.

Let me tell you the history of the retirement which he is arguing in the brief. The Division of Retirement brought an action for declaratory decree to see whether or not the Sunshine Amendment was implemented by a prior statute that was enacted prior to the Sunshine Amendment. The Circuit Court in Leon County said no, the Legislature didn't enact that, didn't implement it. It was appealed to the Florida Supreme Court, the Florida Supreme Court said no, the Legislature didn't implement that. But nowhere has the Court ruled up until about two weeks ago in any way on whether or not the retirement was effective which had been submitted to the Division of Retirement.

Now Respondent has now filed another action in the Circuit Court in which he sues Senator Brantley and Mr. Brown on behalf of the Senate and sued Mr. Henderson and others on behalf of the Division of Retirement and in that case, in that case the only one who got dismissed was the Division of Retirement. And here is the principle on which they were dismissed. And we all know this principle so well in the Florida law.

Until the agency has made a final determination under the Administrative Procedures Act there is nothing to be held by the Court, there is no order to look at. Now there is one, Judge Borgman entered one particular order in the Adams packing case that was a little different than that because there was irrefutable injury coming about and there was a crop of oranges and there was something about tattooing of oranges and he said sometimes you can't wait to go through this red tape that us legislators done created so in those cases the Court might take jurisdiction.

But the rule of law in Florida that was ruled as late as two weeks ago, of course two or three weeks ago in the Gunter case on the rate cases, the Court said don't bring it to us until Mr. Gunter has done his job, until he is through with it. So I'm telling you that the Division of Retirement has not finally ruled upon that.

Now what is the effect of us being here? Why should we be here? Let me tell you. The JQC has never concluded all of its work in this matter. The Governor has not accepted this resignation. It has not become final. I would submit to you, though you may think this is tenuous, that this is a Court of Impeachment and if this were dismissed and if these other two bodies didn't act before withdrawal of that resignation which—you know that the man would still be in office and could return to his bench if he so desired.

Gentlemen, this is a crucial point. It's our contention that there are merits of this cause that ought to be heard by you and that you have clearly got the jurisdiction to hear them. I think that it's in keeping with the public trust of the State of Florida that this matter should be inquired into and that you should entertain the Articles of Impeachment on the merits because we have no question in our mind that you clearly have the jurisdiction to hear this case.

Thank you very much.

MR. CHIEF JUSTICE: Rebuttal, Mr. Jacobs, 12 minutes. For information for the members of the Senate and Mr. Jacobs, that the Chair intends to declare a recess at the conclusion of your rebuttal remarks.

MR. JACOBS: Thank you, Your Honor. I understood Your Honor stated to me earlier on in my argument that I should not address the due process questions at this time but go directly to the question of law?

MR. CHIEF JUSTICE: The jurisdiction, right.

MR. JACOBS: And that was—I was following Your Honor's instructions. Is it now appropriate to address the due process or should that be—

MR. CHIEF JUSTICE: Addressing the matter concerning counsel, Mr. Jacobs?

MR. JACOBS: Yes, sir.

MR. CHIEF JUSTICE: I intended to separate that issue from the issue of jurisdiction. I do not feel that they're appropriately together.

MR. JACOBS: I agree with that position, Your Honor. Although most judges don't require my agreement in order to reach their conclusion.

MR. JACOBS: Let me respond very quickly to my great friend and adversary, Mr. Rish.

In his first point he says that the resignation has not been effective. We covered that in the brief.

He says that there has been no conviction. I share that view. The only reason why the question was raised is because the first charge against the Respondent before this body is that he was convicted and the argument was made before in the trial court, in the Circuit Court here in Leon County that they were not prepared to stipulate that the timely filing of the appeal which has not been disposed of delayed the finding of guilt until the appeal was disposed of. I completely agree with the principle of law and the cases that are cited in opposing counsel's brief to that point, insofar as the conviction is concerned.

I also agree that the two leading cases are as stated by Mr. Rish. I also agree that, and if you will look at our brief and carefully analyze you will see that the only instances in which acceptance by the Governor has been required is when not to do so would be inequitable, totally inequitable. Like the West Florida politics that Mr. Rish spoke to about the November 7th, 8th and 9th with the constable over in West Florida. That's political realism that the Court saw through and the Court fashioned a law to mete justice is what they did. Like they didn't mention the '38 decision in 1939.

So therefore the question is do we now declare, it's an open question, it has to be, in light of the law. Do we declare that the Governor has the absolute right and without discretion to accept or reject the resignation effective immediately and without reservation? By the way, in opposing counsel's brief, they do make an interesting point somewhere about their—in their brief they do make the point that—it's the first time I have heard it argued, that we really didn't resign without reservation because we continued to ask for a pension. That is the first instance in which I have heard it suggested that as a condition precedent to effectively resigning a public office a public official had to waive his pension benefits. Remembering that Circuit judges during this man's service from 1961 forward, he paid 6 percent off of the top, gross, after having paid income tax on that 6 percent up 'til 1963 and thereafter 8 percent of the top total in compliance with the law. So we don't come asking for a gratuity from the State of Florida.

Now the argument was made, "resign hastily made . . ." they were referring to the Federal case in which I believe it was Mr. Belknap, I have forgotten which one, filed at the last hour before he was about to be impeached, filed his resignation with the President and it was accepted, by the way.

One of the things that I do on every case that I try, and I think most lawyers do, too, is to draw up a chronology. Where did this come from?

Here is mine that I drew for the oral argument in the Supreme Court on the Sunshine case, the case that preceded this one. January 1961 SS, that was Sam Smith, at that time, Respondent elected Circuit judge. 1972 SS became member of the elected State Officers Class. 11/2/76 general election. 11/18/76 Respondent arrested and charged. 11/18/76. 1/14/77 SS indicted by Federal Grand Jury. 2/16/77 SS applied for disability retirement. 2/15/77 Respondent again indicted. 4/29/77 SS convicted by jury. 6/3/77 SS and so forth.

So hastily from '61 to '72 to '76, 11/18/76 was when this man was arrested and charged, arrested and found that charges would be forthcoming. Then on January the 14th, '77, some approximately two months later, he was indicted by the Grand Jury and thereafter sought to resign. If we are talking about equity here, this individual applied on 2/16/77. The State of Florida filed suit in Circuit Court, lost it square, went to the Supreme Court of Florida and then lost it square unanimously upholding the position that he was entitled to his pension under the questions that were presented there. He now has to file another suit in Circuit Court, and by the way Mr. Rish is correct, motions to dismiss were filed and everybody knows how little you can glean. All you can glean from the court denying the other side's motion to dismiss is to know you didn't lose.

The motion to dismiss of the Governor, the motion to dismiss of the Attorney General, the motion to dismiss of the President of the Senate and the motion to dismiss of the Secretary of the Senate were denied. Therefore for whatever it's worth, as the fellow said who jumped out of the 14th story building, passing the second story he said everything is all right so far.

Now the previous litigation, I have already pointed out they made a point of that. The second action that is necessary, why,

because 14 months ago on 2/16/77 this man applied for disability retirement and he hasn't gotten that denial yet. In fact it was argued here that they haven't made up their mind yet. They have been to the Supreme Court once, they filed a lawsuit. They certainly should have raised all the questions that they had in their mind as to whether or not he was entitled to a pension, but they did not. That has not been resolved.

The Division of Retirement has not yet finally made up its mind and he is still in office. That was the statement. That if his appeal was reversed he still is in office.

Mr. Chief Justice, in his reports to you, reports to you, directly pointed out, I think it was on the second page, that the reason why we are here, it must be recognized that the primary purpose of these impeachment proceedings is to deny the Respondent retirement benefits by bringing him within the purview of Section 121.091(5)(g) which provides as follows:

"Any elected official who is convicted by the Senate of an impeachment offense shall forfeit all rights except return of the money that he has put in." That's what we are here about. We are here about his pension, whether or not he is entitled to it. Because as again recognized by the report of the Chief Justice, we have sought in every way possible to make it clear that the Respondent would waive now and forever that which has already occurred and that is that he will never serve as a public official in any public position again. So that is aside. He has removed himself from office. He has sought to resign, he has done everything within his power except, if you conclude it necessary, he has not waived his pension benefits. But he has done everything else that a man could have reasonably done or unreasonably have done to demonstrate that he is no longer a public official. And I think at least that is crystal clear.

The arguments that you have heard on this floor concerning other public officials, it's always difficult because when you make an argument about the chief executive everybody thinks that you're talking about the present incumbent in that position. But Judge Taylor made it clear in the case. It is not how the power is exercised that raises the questions of law. It is the extent of the power.

The examples that are in the briefs have occurred to others and have been related to me. If a Governor—

MR. CHIEF JUSTICE: Mr. Jacobs, your time has expired; if you could give us your final thoughts, please.

MR. JACOBS: Thank you. If a Governor desired to favor one party over another party he could do so by the simple expedient of not accepting the party's resignation that wished to run for office, he could do so. If a person just could not stand a requirement of law to the point that he felt that he could not in good conscience follow that law and he is sworn to uphold the law and the Constitution of the State of Florida then he would resign and the Governor could then say no, you may not resign. You will continue in office and you will serve and you will do that which the law, although it be an unreasonable law, although it be a bad law. I do not concede that to be the law of the State of Florida.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE: The Court at this time will declare a recess and until 10:35, by the Senate clock here. I ask, number one, when you come back, the first matter that will be before us will be that for the opportunity for members of the Senate to ask of counsel for each of the parties questions. I ask that you do be back on time so that we may commence on time. The Senate will be in recess until 10:35.

Whereupon the Senate recessed at 10:10 a.m.

The Senate was called to order by the Chief Justice at 10:35 a.m. A quorum was present—36:

Barron	Gorman	Myers	Spicola
Brantley	Graham	Peterson	Thomas, Pat
Chamberlin	Hair	Plante	Tobiassen
Childers, Don	Henderson	Poston	Trask
Childers, W. D.	Holloway	Renick	Vogt
Dunn	Johnston	Sayler	Ware
Gallen	Lewis	Scarborough	Williamson
Glisson	MacKay	Scott	Wilson
Gordon	McClain	Skinner	Zinkil

THE SECRETARY: A quorum is present, Mr. Chief Justice.

MR. CHIEF JUSTICE: At this time, as I mentioned to you, you will have an opportunity to ask questions first to counsel representing the Respondent and then after those questions are completed counsel representing the House. The reason why the Respondent goes first because the Respondent is the Movant in this cause.

Mr. Jacobs, I think it would be well if you took the well.

Senator Zinkil had sent his in up first on a note so I have his name first.

SENATOR LEWIS: Mr. Chief Justice?

MR. CHIEF JUSTICE: Yes.

SENATOR LEWIS: I just want to ask a question. I wonder if it would be available for us, the sequence Mr. Jacobs read off for us, the time frame that he had on a yellow sheet of paper; I would just like to get a copy of that, the facts. There are a couple of comments I wanted to ask about it.

MR. JACOBS: I would submit it for copying or typing or either.

SENATOR HAIR: Mr. Chief Justice?

MR. CHIEF JUSTICE: Senator Hair.

SENATOR HAIR: I was just going to mention that those dates are in the copies of the briefs that have been submitted.

MR. CHIEF JUSTICE: But not only on the copies of the briefs but the matter of the dates just follows—they're summarized, I think, in chronological order in the brief of the Board of House Managers. Starting at page—Mr. Jacobs, maybe you can help me on that. Let's see. The statement of facts starting on page, that would be Roman Numeral 5, sets forth the chronological date of occurrences that took place. Is that sufficient, Senator Lewis?

SENATOR LEWIS: Yes.

MR. JACOBS: If it please the Court, I do not believe that there is a difference on the dates; if there is any difference, it's an oversight because there is no controversy about the dates that the various offenses occurred. If there is any conflict it's an oversight on one of our parts.

MR. CHIEF JUSTICE: Senator Zinkil.

SENATOR ZINKIL: Mr. Justice, at the request of the reporter I am Senator Zinkil, District 32.

Mr. Jacobs, in your discussion and in your presentation you mentioned Article III, Section 17 and I found that quite interesting. You also mentioned and referred to Mr. Adams and to Mr. Christian and you brought that out. I would like to ask you a question.

Were not those two questions that you referred to prior to the enactment of the Legislature of Section 121.091(5)(g) that you referred to?

MR. JACOBS: That is correct.

SENATOR ZINKIL: Before that?

MR. JACOBS: Yes, sir.

SENATOR ZINKIL: One other question. It was about the resignation but you brought it out in your points that it was not offered until January 13th of 1978, that is shown in Exhibit I so I don't have to ask a question. But I do have to ask this question. Was not Judge Smith an officer at the time of the offense as the jury verdict rendered on April 29th, 1977, he was a public official and as such is he not qualified to receive benefits due to such an officer or public official?

MR. JACOBS: Well, it is our position that up to the time that he filed his resignation he was a suspended officer. He did not exercise any power and in fact the briefs reflect that he sought the chief judge of his Circuit and was voluntarily removed from all judicial responsibilities upon his being arrested.

He served and has not from that day to this served in any capacity, judicial capacity.

SENATOR ZINKIL: Is he not due to receive benefits because of his service as a public official or officer?

MR. JACOBS: Our position is that he is entitled to benefits as a public official. Yes, sir.

SENATOR ZINKIL: Unless he is impeached?

MR. JACOBS: Yes, sir.

SENATOR ZINKIL: Thank you.

MR. CHIEF JUSTICE: Senator Gallen.

SENATOR GALLEN. Mr. Jacobs, I would like to ask this in respect to that hypothetical and not to particular facts in this case. It goes to the question of jurisdiction. Under the argument that you have made that the State does not have jurisdiction wouldn't it then be possible for a judge who is eligible for retirement to commit impeachable offenses and then retire from office and be eligible and qualify to serve on appointment by the Court under Article V, Section 2?

MR. JACOBS: I would not think so. When he files, under the Spector case, when he files his resignation although it might be effective—

SENATOR GALLEN: I said retirement, Mr. Jacobs. A justice or a Circuit judge was eligible for retirement and he had committed an impeachable offense could he not retire and then continue to serve if appointed by the Supreme Court or continue to be qualified to serve with his consent either as Supreme Court Justice, if that was his office, or District Court or Circuit Judge under Article V, Section 2 unless he was impeached and disqualified of impeachment?

MR. JACOBS: I would be of the opinion and the Chief Justice could probably better answer this than I, but I would be of the opinion that he would not be eligible for service having been removed from office.

SENATOR GALLEN: No, I said if he retired, if he was not removed from office but he committed an impeachable offense while in office and he elected, he was eligible for retirement, he had sufficient tenure and he retired from office to avoid impeachment proceedings under Section 2, Article V, the Chief Justice has power to assign that judge as long as he is a retired judge and consents to an assignment so he could continue then to be qualified to serve as a Circuit Court, District Court Judge or Supreme Court Judge, whichever office he had held?

MR. JACOBS: Under the hypothetical which you raise it may be possible. Number one, it would not be possible in this case. And number two, I would not believe that any chief Justice of the Supreme Court would ever assign such a person to serve as either.

SENATOR GALLEN: That was not part of my hypothetical.

MR. JACOBS: But we are talking about—

SENATOR GALLEN: But he would be qualified?

MR. JACOBS: He might be qualified. Yes, sir.

MR. CHIEF JUSTICE: Senator Ware.

SENATOR WARE: Mr. Jacobs, in your closing you indicated that the House position was that there was no limitation on the time within which an impeachment could be brought.

MR. JACOBS: That's correct.

SENATOR WARE: Would you state what your position is on the time limitation for impeachment?

MR. JACOBS: It is my opinion that the statutory requirement of acceptance of a resignation is a ministerial act and the Governor has a reasonable period of time. I would agree with the dissent in the case, the November 7, 8 and 9 case and there was one judge who dissented to that opinion and said that they could have accepted it nunc pro tunc, now or then and have it relate back to the date it was submitted. And I would take the position, and I think it is the equitable position to take, then when a person files his resignation without reservation and effective immediately as soon as that is processed through the office of the Governor or Secretary of State or wherever it's processed it becomes final because those acts are really ministerial, they cannot pass upon the validity or cannot withhold acceptance of that resignation. And therefore then he would no longer be a public official and like every other person in the history of Florida that has ever sought to resign he would then not be subject to impeachment.

MR. CHIEF JUSTICE: Senator Spicola.

SENATOR SPICOLA: Mr. Jacobs, you made the point that if the Governor has power relative to removal, a discretionary power as to relative to removal as to acceptance of a resignation that there must be, to make that a legitimate delegation, some guidelines. On the other hand, the Governor has the power of appointment of a multitude of officials not subject to confirmation that serve at his pleasure that have no statutory guidelines. Where is the consistency there if he can, you know, appoint someone to office without guidelines, why are guidelines required for the acceptance of this resignation?

MR. JACOBS: The development of that theory came along this way. The courts have said that the Legislature has all legislative power. But it has the power to delegate that legislative power to other boards, agencies, commissions, what have you, and it has the authority to delegate broad powers, like the authority of the Comptroller over banks, almost exclusive. Then the Court said that when the Legislature delegates that power it may not delegate the entire legislative power because you have to surround that delegation of power with standards and those standards have to be that which would allow a measure of whether or not the exercise of the power is within the standards of the delegation of the power. So if it's absolute—

I would say if you're giving a legislative power, you have to do that with standards, I would assume that the power of appointment would be an executive or an administrative power that might not be subject to the same rules.

MR. CHIEF JUSTICE: Senator Myers.

SENATOR MYERS: Mr. Jacobs, I'm going to ask you the same question that I'm going to put to the prosecution as well so I don't want you to consider this as a frilly or an unfriendly question but simply as a matter of hopefully objective inquiry.

My inquiry relates to the question of motivation for resignation and I ask you simply why would it be considered or why is it considered a spurious or wrongful motive to resign for the purpose of avoiding litigation, avoiding impeachment or to retain a retirement benefit? I have somewhat of a puzzlement in my mind as to why that is considered a wrongful motivation.

MR. JACOBS: In the 1938 opinion which supports my position, Senator Myers, the Court said that the motivation for the resignation was not significant and had no relevance to its validity. Once it was filed and it was effective immediately and it was without reservation it became effective, period.

Now I don't recall the '39 opinion that reached the contrary conclusion addressing that question. It may have. But I do not remember it addressing that question that you raised.

However, as I say, in every instance the goal of impeachment proceedings as set out by Mr. Justice Terrell is the removal of people from office. The Respondent has been tried in criminal court, a jury has convicted him. He has been sentenced to three years in jail. That is on appeal but if affirmed, that area has gone its way. He is being tried in another forum on another charge that the government has completed its charge and now they are going to proceed with that. But that's a different—that's something different entirely. He resigned his office, he is out of office, totally effectively and completely and I respectfully see no—in fact it would seem to me in the public interest that the public officials who reach the conclusion that their service for whatever reason is no longer in the public interest will resign, step aside, get out, get the position filled by a person who's going to serve in that capacity and let the business continue.

Impeachment has as its primary goal the removal of public officers that the Senate determines to be not proper occupants of that office. So I hope I have responded to your question. I look forward to opposing counsel's response to it.

MR. CHIEF JUSTICE: Senator Dunn.

SENATOR DUNN: A question to Mr. Jacobs.

Mr. Jacobs, I do not see covered in either brief, I will ask the same question to both counsel, under Section 4 of Article VI of the constitution a person convicted of a felony is not qualified to vote or to hold office until his restoration of his civil rights. Under Article X of the revised 1968 constitution the term "felony" is defined. The definition under the revised article does not, to me at least, appear to comprehend a Federal felony. It reads:

"The term felony as used herein and in the laws of the State shall mean any criminal offense that is punishable under the laws of this state or that would be punishable if committed in this state."

Is it your opinion that the conviction when it becomes final or if and when it becomes final in the Federal Court that that conviction of a Federal violation would without question render your client disqualified to hold office under the laws of the State of Florida?

MR. JACOBS: As you, Senator Dunn, well know, I'm not an expert in the field of criminal law. But I—that would be my conclusion, yes, sir. That conviction under that would be a conviction of a felony.

SENATOR DUNN: All right. I have one other question and it goes to your argument.

If, as you contend, the right of the Senate to act and our jurisdictional basis is predicated upon whether the officer is in fact sitting or holding office, could not an officer resign and thereby unilaterally deny the Senate a jurisdiction to impeach and by that process preclude the government and the people of this state from giving effect to the provision within the impeachment article that is in the nature of a forfeiture of the right of that public officer to ever hold office again?

If he can resign, deny the Senate the right to give effect to that remedy, can he not unilaterally thwart the will of the people of this state?

MR. JACOBS: Yes, he can. And that is the reason why I purposefully made it crystal clear and make it clear to this body now that we will take such action as is necessary to set in concrete the waiver once and now and forever of that right as we agreed to do in the House and agreed to do in the Senate and I make that agreement in the presence of my client.

SENATOR DUNN: All right, sir.

MR. CHIEF JUSTICE: Are there any further questions of Mr. Jacobs?

Are there any questions of Mr. Rish? Senator Gordon.

SENATOR GORDON: Mr. Rish, let me describe a hypothetical situation to you. I'm really not convinced of this question of the ability of the Governor to reject a resignation. Suppose there were a Governor in office who was serving his first term and as the end of that term approached the Chief Justice decided he wanted to run for Governor and he knew he would have to resign to run under the law but he resigned three months before so there is no question of compulsion under the right, under the resign to run law.

So he decides to resign in order to spend his time campaigning. Would it be your contention that the Governor could turn down that resignation because he would like to prevent the opposition?

REPRESENTATIVE RISH: No, sir. He could not turn it down. It would be a clear abuse of his discretion. His actions within the statute which we passed, Senator Gordon, last year, and by an overwhelming vote in this body and at the other end said that there would be a resignation upon the submission and acceptance by the Governor. Now that like all laws indicates that there would be some common sense and some discretion.

In an abuse of discretion I am sure that the Court would hold in that instance that it was merely an administrative act that he not perform, a ministerial duty and I think in that position the Governor could not keep down opposition.

MR. CHIEF JUSTICE: Senator Myers.

SENATOR MYERS: Mr. Rish, I will ask you the same question that I asked Mr. Jacobs. Why is it or should it be considered a spurious or wrongful motive to resign to avoid litigation, impeachment or to retain a retirement benefit?

REPRESENTATIVE RISH: Mr. Myers, I would respond by saying to you that sometimes the motive involved does have some implication in the law and well, it should. I would like to answer you, I believe, by example rather than any other way.

We know that from time to time we have children who are killed by automobiles. We have a typical case of the housewife who's going to school with her children and the boy darts out or the girl darts out from behind a car. There is never any action taken on that particular case.

Then we have the drunk driver who runs through a crowd and kills a person or nine people or something and we immediately file manslaughter charges or other charges against him. The case law, now the clearest case answering this is the Ferguson case that was tried six years after the impeachment.

Former Governor Ferguson of Texas said that that impeachment didn't have a bit of validity even though he wasn't there, didn't have any validity because I had already resigned. And that court said that, let me tell you, 11th hour resignation to thwart justice will not be accepted and that's our position that there is a difference, there is a distinction between a normal resignation and an 11th hour resignation designed to thwart what we believe to be the public trust that cannot be thwarted in such cases. And to follow the logic of that matter it would seem to be that we would say—in the Constitution that we could better say impeachment in the State of Florida will not be available any time a person wants to submit his resignation for something he has done.

MR. CHIEF JUSTICE: Senator Myers, a further question?

SENATOR MYERS: Yes, may it please the Court, Your Honor. I would like to follow it up by the other question that concerns me and that is the question of equal treatment that has been raised. If there has been a precedent where Articles of Impeachment have been filed in the House or to the House against a public official and while the Articles of Impeachment were impending the public official has resigned which I understand has been the case, we know has been the case in two other instances in the past, I think McCain was one, O'Malley was another, when the resignation was submitted the Articles of Impeachment were dropped.

REPRESENTATIVE RISH: No, sir, Senator Myers, that's not 100 percent correct. When the resignation was submitted and accepted by the Governor it was dropped.

SENATOR MYERS: Well, my question then is why in the previous incidents was the resignation submitted and accepted and Articles of Impeachment dropped and in this instance the resignation was submitted but not accepted? Was the sole purpose for not accepting the question of the denial of the retirement benefits?

REPRESENTATIVE RISH: With the exception of the O'Malley—excuse me—with the exception of the Christian matter you are correct. There had been no vesting which would violate the public's trust by allowing that person—now there is no question about the retirement. Let's make this clear because I'm sure Mr. Jacobs didn't mean to mislead anybody. Nobody has ever tried to contest or say that Judge Smith could not get back every dime that he has ever paid into the State Treasury for his retirement. That's not the matter that would be at issue, Senator Myers.

In the other matters, that was not the matter of issue. They had not vested sufficiently to draw out not only their contributions but those that were paid by other taxpayers in the State of Florida and other people in the retirement system. And that's the distinction that—that's the only distinction that I can make.

MR. JACOBS: Mr. Chief Justice?

MR. CHIEF JUSTICE: Mr. Joe Jacobs.

MR. JACOBS: May I be heard very briefly on that point?

MR. CHIEF JUSTICE: Just a minute. Any objection, Mr. Rish?

REPRESENTATIVE RISH: No sir, I wanted to say that I would be happy to have him correct it if I have said something—

MR. JACOBS: I know that he misstated a fact because he was not there and did not know. But in the Sunshine case appeal to the Supreme Court the counsel for the Retirement Division argued that if the Sunshine Opinion Section was self-executing and Mr. Smith was not entitled to a pension on that basis, he was also not entitled to a return of the monies that he had paid in. They made that argument before the Supreme Court and they were questioned pretty carefully about it by the Court. So there is a record. I know you did not mean to misstate that.

REPRESENTATIVE RISH: Yes, sir. I certainly did not mean to. In all the discussions that we had with all of the parties concerned, it's been our clear understanding that nobody would try to forfeit the dollars that Judge Smith had put in and I would never try to defend that right, that he put those dollars in and he certainly ought to be entitled to get them back out. To me it was the matter of the other dollars that may be matched, dollars paid by other people. And I apologize, Mr. Jacobs, for misstating that.

MR. CHIEF JUSTICE: Senator Scarborough.

SENATOR SCARBOROUGH: If I may ask Mr. Rish a question or two. Mr. Rish, back in 1968 when the Legislature rewrote the current Constitution and the impeachment section, Section 17 was debated. My vague memory is that it's more or less a carryover of the 1885 Constitution impeachment language with the proviso of the Lieutenant Governor who we did not have prior to that but it seems that to me that my recollection was this morning that the concept of impeachment as contained and couched in the current Constitution was there primarily and almost solely for the purpose of removing a public official who had committed a wrong doing of some sort who resisted leaving office and wanted to stay in office and the impeachment process and the impeachment articles were couched and geared directly to that.

Now my question is to you, the language, in reading from the Constitution, that after the House has prepared the Articles and the Senate has tried him that judgment, if a person is convicted, it says in cases of impeachment it shall remove the offender from office.

REPRESENTATIVE RISH: Yes, sir.

SENATOR SCARBOROUGH: Now do you read anything in there any place that says that the person can't resign, that he must submit to involuntary servitude and it appears to me that the question has already been answered as far as our constitutional responsibility is concerned.

REPRESENTATIVE RISH: Well, if you feel, Senator Scarborough, that the constitution means that you can impeach only those who have not resigned, then I would submit that that would be the conclusion that you would reach. However, it's my understanding of the case law as has been a little different on that and also if you will read the next sentence, Senator Scarborough, it says and also prohibit him from receiving—

SENATOR SCARBOROUGH: But the bottom line is and has always been directed to remove the person from public office.

REPRESENTATIVE RISH: My answer, as I honestly understand it, would be that that is one of the primary reasons for that is to remove the obstinate officer from his office but it likewise can be used in cases such as this one at bar this morning.

MR. CHIEF JUSTICE: Senator McClain.

SENATOR McCLAIN: Mr. Rish, has any person in history that you know, and I'm speaking of course of impeachment, ever resigned and assuming it's a valid resignation, was accepted, was a valid resignation, and still been impeached?

REPRESENTATIVE RISH: It's my understanding that Governor Ferguson was in that position, Senator. Now the language, as I recall it, just said he had resigned and there was no great to-do about it. The case that arose six years later and he said that impeachment was not valid because I had resigned and they said no, that's part of it, resignation is part of it, the other part is holding future office. You were impeached on both scores so I would say that I believe Governor Ferguson's case fell in that guideline.

MR. CHIEF JUSTICE: Senator Zinkil.

SENATOR ZINKIL: Mr. Rish, I asked the attorney for the Respondent a question particularly concerning 121.09(5)(g) and got the reply that that was prior—that we passed that subject to a couple of other cases where impeachment had started and then was ceased. I would like to ask, I can't find anywhere in your brief the reference to (f) of that same section which the reason we passed (g) is for equity to all people. And that states that any member that has been found guilty prior to retirement shall lose his benefits and only receive his funds and I think that's the reason—is that one of the reasons that the House felt that we should have to take action for equity but if this man had not been an elected official then he would have lost his retirement and being an elected official he has to be impeached to lose it?

REPRESENTATIVE RISH: I think that's a fair statement, Senator Zinkil. I would hasten to add to you that of course the House and Senate in the Journal of your Senate on April the 8th, 1977, you will find a vote of 38 to none, I believe, enacting another sentence in a statute that said that it required acceptance by the Governor of the resignation. That was likewise, I think, to get where we are this morning.

MR. CHIEF JUSTICE: Senator Holloway.

SENATOR HOLLOWAY: Mr. Rish, under the committee that I chair, under Executive Business the rule of the Senate, and I will agree that this speaks to a suspension of a public official, but the rule says an executive suspension of a public official who is under indictment or who has pending against him any criminal charges filed by the appropriate prosecuting office and a court of record or an executive suspension of a public official that is challenged in the court shall be referred to the committee on Executive Business or a special master. Now here is the point.

Such shall be held in suspense and not be considered by the Senate until the pending charges have been dismissed, until final determination of criminal charges at the trial court level or until the final determination of the court challenge, if any, including the exhaustion of appellate remedies.

Now it's my opinion and I want to ask if it's your opinion that that is there because it wouldn't be fair for the committee or for this Senate to make a determination which would in some fashion probably prejudice in some fashion the judicial processes that this man would be before. The reason I ask you that is because I further want to relate to the constitutional provision and that is simply this, that in 17(a), Section 17(a), the Governor, Lieutenant Governor, members of the Cabinet, Justices of the Supreme Court, Judges of the District Court of Appeal and Judges of Circuit Courts, which we're speaking of today, shall be liable to impeachment for misdemeanor in office.

Now has the House of Representatives then, have they tried this man and convicted this man and does the word "for" there mean that he is guilty now, has he been adjudged guilty by the House of Representatives, has he been determined to be guilty by the ultimate or the supreme law of the land and have we acted hastily?

REPRESENTATIVE RISH: No, sir. He has not been finally found guilty by the House. Senator Holloway, the House in bringing Articles of Impeachment sits exactly as a grand jury. The House is charged to find probable cause for a misdemeanor in office. Misdemeanor in office means many things, one of which is conviction of a crime, certainly of a felony.

Now we have set forth in Article I of our impeachment articles symbolically that one of the things that we have charged him with was that a jury found him guilty. Now that's not been finally adjudicated. If it had been, if his appellate remedies had run, it's our position that we could have simply come down here with a copy of the grand jury indictment, a copy of the jury verdict and a copy of the judgment and the appeal denying it and said look here, Senators, this man has been convicted finally of a felony. He ought to be impeached and that would have done it.

We brought five articles, one of which we said, hey, there were some circumstances surrounding a trial in Jacksonville, Florida that resulted in this man being found guilty by that jury.

SENATOR HOLLOWAY: I believe what you said, I'm not sure, is that under this 17(a) that where it says for misdemeanor in office that has not finally been determined yet?

REPRESENTATIVE RISH: No, Senator Holloway, that doesn't mean just a conviction of a crime. That's one of the ways of being guilty of a misdemeanor in office. We have alleged four other things that we feel that Judge Smith was guilty of that would be in the matter of the merits. But we have charged him with four other things that may or may not say that he was guilty. Whether he was ever convicted of that or not, we still could present to you the same testimony which the jury heard on this matter and you would find out whether or not it was a misdemeanor in office and whether it constituted a crime.

SENATOR HOLLOWAY: That then will be in your brief that I will pick up, right?

REPRESENTATIVE RISH: Yes.

SENATOR HOLLOWAY: All right. Lastly, then, Mr. Rish, what is the appeal from this Senate sitting as a Court of Impeachment today or at any other time in the future?

REPRESENTATIVE RISH: Mr. Holloway, there is no appeal. This is neither a civil trial nor a criminal trial. This is a matter which impeachment is halfway in between. You are the triers of the facts and you are the triers of the law. This Senate has all power for jurisdiction until it reaches some particular point and I don't know where it is, that if you were denying the man or woman due process of law before you, that is to say we couldn't hang a man by his heels and flog him, if we reach that ridiculous result somebody would enjoin us. But until such time as there is an obvious invasion of his rights of due process of law, such people, legal giants as Chief Justice Glenn Terrell has said that you have the sole and exclusive jurisdiction of this matter and we don't intend to interfere in it.

Now such people as Judge Harris Drew reiterated that a very few years ago. You are the sole triers of the jurisdiction, your facts and your law. So, Mr. Holloway, you sort of sit as king in impeachment matters and there is no appeal on this side of the river.

SENATOR HOLLOWAY: That is the point. Since there is no appeal from this court or this Senate sitting as a Court of Impeachment what we are being asked at this moment is to make an interpretation of the Constitution of the State of Florida.

Now that's what I have heard to this point. Now we are not asking the judicial branch of government to make this decision, an interpretation of that constitutional provision which is 17 that I just read. We are to make that determination today and I just don't understand as a lay person why we have not exhausted the judicial processes as to the interpretation of the Constitution. And further the Constitution, if we were asked to interpret today's statutory law, I could understand that because we are charged with the responsibility of providing all of this statutory law. But at the present time under our system we are not charged with the responsibility of providing constitutional law. Constitutional law is by a constitutional commission, revision commission, then to the public for a referendum and that's the Constitution of Florida. So why are we asked today to interpret the Constitution of Florida?

REPRESENTATIVE RISH: Because other people have alleged that the Florida Statute is merely an extension of where it says that you pass a law that said, Mr. Holloway, that it requires a resignation accepted by the Governor, which we did last year and put that in there. Now we determine whether or not that means him in the office, if it's important that he stays in there subject to the impeachment required in our Constitution or whether or not you believe the precedents that have been laid down that the law of Florida says that you still could go ahead with the impeachment even though he were out of office.

MR. CHIEF JUSTICE: I have got Senators Barron, Scott and Wilson that are trying to ask questions. Senator Barron.

SENATOR BARRON: Yes, Mr. Chief Justice, for a series of questions.

Mr. Rish, would you agree with me that the punishing of a person for the commission of crimes is in the courts and that the Senate sitting as a Court of Impeachment under the Constitution of Florida is designed to remove from office people who they finally conclude are unfit for office; is that agreeable?

REPRESENTATIVE RISH: Well, partially, yes.

SENATOR BARRON: And would you agree with me that it is not in the Constitution of Florida and the Constitution does not direct us relative to people's pension, that that, too, is a matter for the court to decide under the laws of Florida?

REPRESENTATIVE RISH: Mr. Barron, I didn't mention pensions this morning. Mr. Jacobs did. And I suppose we would all be a bunch of blind idiots and putting our heads under rocks if we didn't go ahead and talk about it. Now the Chief Justice, I think, mentioned it in his pamphlet already that this might be one of the fallouts that would come from this impeachment trial. There is a good chance that Judge Smith will not draw 20 or 22 thousand dollars a year and you and I won't rule on that; the courts will rule on it ultimately. There is a good chance that he won't draw 20 or 22 thousand dollars a year for life if he is impeached.

As it stands now without impeachment there is a pretty good certainty that he will draw it. That's where I think we are this morning, Senator.

SENATOR BARRON: But whether he gets it or not is not an impeachable offense; he hasn't been charged with that?

REPRESENTATIVE RISH: No, sir. No, sir, we have not mentioned that in our allegations at all. We have just talked about impeachment.

SENATOR BARRON: And would you agree with me that the Governor now has no jurisdiction over this matter; it's now in the sole jurisdiction of the Senate of Florida? He cannot interfere, he can make no comments, that he has done his job and now it's up to us?

REPRESENTATIVE RISH: Well, Senator, I could go with you to a certain point but I would not predict what his authority or reservation of jurisdiction might be if Judge Smith continues to say, hey, that resignation is in, its irrevocable, I don't want it back. Now the Governor, as I understand, has refused it one time. It may be hanging out there so to that extent I don't know what the Governor might do.

SENATOR BARRON: Then would you agree with me that through the history of Florida no Governor has refused to accept a resignation when a person is out of office and no longer a threat to the public, if that's true and he's accepted all the others, this particular Governor, I don't know what other Governors will do, that a Chief Executive of Florida, whoever he might be, may visit vengeance upon a person through the Senate of Florida if he does not like the particular offense that he committed? He might accept the resignation for embezzlement, he might accept a resignation for drunkenness in office, he might pick and choose and thereby transfer to the Senate the action of rendering a criminal type penalty against a person at his will by not accepting the resignation. Is that a possibility under the contention of the House?

REPRESENTATIVE RISH: Unless the House and Senate have plugged the gaps that were left in the Sunshine Amendment, that could be a possibility that a Governor could accept some and reject others and that the House and the Senate then could look toward impeachment on those matters.

The fact that he had—now Senator, the fact that the Governor had accepted those, I'm telling you, would not still preclude you from impeaching that individual if you wanted to.

SENATOR BARRON: Well, I'm aware of that. It's never been done yet.

So if the Constitution provides Article III, Section 17 that judgment of conviction in cases of impeachment shall remove the offender from office and in the discretion of the Senate may include disqualification to hold any office of honor or trust and that's the only thing that the Senate can do, could we by dismissing this impeachment or adopting this motion to dismiss this morning with a concurrence of counsel from the Respondent and the House enter into an agreement that says he can never hold office and thereby be able to do exactly what we can do under the Constitution without incurring three or four or however many weeks it's going to be in trial and thousands and thousands of dollars which would far exceed any pension benefits that he may or may not get, which is not within our jurisdiction? Couldn't we reach the same conclusion in the Constitution by entering into such a stipulation and dismissal of the impeachment charges?

REPRESENTATIVE RISH: I would not feel that justice would be done by doing so.

SENATOR BARRON: What additional justice would you want to do, Mr. Rish? Take him and flog him or put him in jail or what?

REPRESENTATIVE RISH: No, sir. No, sir. Those matters, as the Constitution clearly provides, Mr. Barron, are up for the courts to penalize him civilly or criminally in the impeachment statute and it says that we will have nothing to do at all with that. But it's a matter of his pension, whether or not he is to get that pension—

SENATOR BARRON: That's true, that's the trial.

REPRESENTATIVE RISH: Please let me finish, Mr. Barron. One of the items is whether or not he gets the pension. Now I think that the case law of Florida has said that you may impeach him or not, you have the jurisdiction to do this if you want to and if the Senate doesn't want to impeach him, then

that's what they are going to vote on this morning. I'm telling you that you have the law on your side to do it or not as you want to.

SENATOR BARRON: Just one additional question. But you will agree with me that the Constitution and grounds for impeachment and our obligation under the Constitution simply stated makes no reference to the pension?

REPRESENTATIVE RISH: Absolutely, Mr. Barron.

MR. CHIEF JUSTICE: If I can, we are going to have Senator Scott, Senator Wilson and Senator Scarborough. Senator Scott.

SENATOR SCOTT: Mr. Rish, my question sort of follows, Senator Barron sort of touched on it a little bit. But did the House Managers and does the House contend that the jurisdiction in this matter depends on the manner of exercise of the power by the Governor of acceptance or rejection or do you say that no matter what the Governor does, because really we're here on a jurisdictional matter. Now I would like for you to clarify for us whether we are depending upon the action of the Governor in a particular case for our jurisdiction here or whether our jurisdiction would be here regardless of what the Governor did?

REPRESENTATIVE RISH: In my judgment, and the logic of my argument this morning was that regardless of the status of his resignation you have the power to impeach, under our Constitution and I believe that to be the law of Florida.

Now what strengthens that argument, Senator Scott, is the fact that you voted last year to say that only upon submission of the resignation and acceptance by the Governor is that vacancy created. Now so that the statute to me is a clear distinction.

Now Senator Gordon raised a question that I think fits in with yours about a person who's sitting on the Cabinet with the Governor. As to whether or not that person, if the Governor could refuse to accept the resignation and thereby keep an opponent from coming at him. That matter would not be before the Senate on impeachment because that's not an impeachable offense unless you want to somehow impeach a Governor for being stupid and doing that, you know. But that matter would be entered on a matter of discretion in the courts. This matter is under the Articles of Impeachment and I think you have the jurisdiction if you see fit to use it.

SENATOR SCOTT: Mr. Chief Justice, there's just a following question, if I might. But then are you saying that by statute that the Legislature can effect the jurisdiction under the Constitution for impeachment matters, because that concerns me some as to whether we can—

REPRESENTATIVE RISH: No, sir, we cannot. We cannot do that but the courts have clearly said in Florida where the Legislature speaks to a matter that is definitive in nature and finds what it was talking about that it's well-nigh correct every time and they accept that.

MR. CHIEF JUSTICE: Senator Wilson.

SENATOR WILSON: Thank you, Mr. Chief Justice. Mr. Rish, I have a clarification question for my own, in my own mind, because at the heart of jurisdiction to me at this point, at least, is perhaps the argument about the resignation and whether or not this person, if you read the Constitution, is an officer and subject to impeachment. Now I have heard the discourse on the Article III, Section 17(c) that the two main provisions there and I think Senator Barron touched on this, is one, removal from office. So that gets back to the question of the resignation.

And two, the disqualification to hold other office which has been touched on at length by maybe both sides.

I would like to go back and I'm thinking now in terms of equal protection, I would like to go back to the case of Christian, O'Malley, Dekle and McCain. Now these resignations, if I understood you earlier, were accepted by the Governor.

REPRESENTATIVE RISH: Yes, Ma'am.

SENATOR WILSON: And the House—

REPRESENTATIVE RISH: To the best of my understanding, Senator Wilson, all four of those you mentioned were.

SENATOR WILSON: But in any event the House dropped proceedings in those instances because, I'm assuming, they were, quote, removed or out of office.

But what about the second part of that article about the disqualification to hold other office? I guess what I'm concerned about is why was there the concern either on the House's part or the Governor's part in this case that that second provision that was terribly important, but in the other four I mentioned it appears not to have been important?

REPRESENTATIVE RISH: Well, if we are going to face facts, with the exception of the Christian case in which benefits were awarded and I believe that Mr. Jacobs is probably more familiar with that case than any of the rest of us since he represented—I believe in that case he represented Mr. Christian. As I recall there was an acceptance of the resignation and it finally boiled down to a guilty plea or not guilty or nolo contendere and what he had been found guilty of was a misdemeanor or a felony and he did get his pension. And all of the others they—

SENATOR WILSON: I'm sorry. The question is not to the pension. The question is to the ability or the right to ever again hold an office of public trust.

REPRESENTATIVE RISH: All right, then, I am not concerned—please ask me your question again.

SENATOR WILSON: I have heard both sides speak to Article III, Section 17 and the responsibility that the Senate has and why it has it from the people of Florida. And an impeachment procedure appears on the face of it to be two main purposes.

REPRESENTATIVE RISH: Yes, ma'am.

SENATOR WILSON: One removal from office and the second part is to prohibit that person once removed, if the Senate should decide, from ever, ever holding an office of public trust again.

REPRESENTATIVE RISH: Yes.

SENATOR WILSON: So if we can set aside the removal from office question, it can either be done by the Senate or it can be done by resignation or we can argue what makes that resignation valid. But the second part, the importance of protecting the public from a person who obviously has abused the public trust, if you found them so, is equally important, apparently.

Now by the Governor's action if he in fact accepted the resignations of these four, but more importantly, by the House's action by dropping the articles or the proceedings, it appears that there was no concern in these cases to protect the public from these people from ever holding public office yet this is being stressed as an important reason why that this impeachment proceeding should continue in this case. And under equal protection I am trying to find out, you know, why that wasn't just as valid a reason to continue the impeachment situation

there because you have already argued that with or without the resignation the Senate could take jurisdiction.

REPRESENTATIVE RISH: Yes, ma'am. I think Senator Barron and I quite frankly faced it realistically and I'm not going to deny that. It's come up as a matter of course and it should be. In those cases and as I was explaining with the exception of Mr. Christian's that didn't turn out like everybody thought it was going to, as he ultimately got his, under some technicality, got his pension, the others, there was no question there was a two-prong attack. One was the matter of whether or not he would draw any pension or emolument from the State for services that he had been performing when he violated the public trust and the other was holding office in the future. It was just determined at that time that one of them without the other was not sufficient to go on to the impeachment trial. And that answer may not be 100 percent satisfactory but it's the only honest one I can give you, Senator Wilson.

SENATOR WILSON: Just one last question. What date did the House commence impeachment proceedings; do you recall?

REPRESENTATIVE RISH: January the 31st, I believe, was the date that the Speaker charged my committee with the inquiry.

SENATOR WILSON: Thank you.

MR. CHIEF JUSTICE: Senator Scarborough.

SENATOR SCARBOROUGH: Mr. Rish, something is bothering me a little bit and I want to go back to an analogy that Senator Gordon raised. A hypothetical, if a Supreme Court Justice could submit his resignation in order to run for the Governor's office and I think your answer was that no, that wouldn't be allowed, that the courts would find that that's an abuse of his discretion.

Now is that your personal observation, that is not in the law any place, is it, that's just a feeling you have that the courts would do the right thing?

REPRESENTATIVE RISH: Well, the law, I can't tell you on an individual case, that would be my opinion. But, Senator Scarborough, the law is that where an officer is charged to do a duty and the court says quite clearly he abuses that duty, then they are going to do something about it. If it's within his discretion, then he doesn't clearly abuse it, then they don't define it. So you have got to put them in there and your opinion is worth as much or more than mine. More, this morning.

SENATOR SCARBOROUGH: But it is your opinion that the courts would do the right thing?

REPRESENTATIVE RISH: Yes, sir.

SENATOR SCARBOROUGH: Well, that's where I'm troubled because I recall your debate and others on the ERA question, some of the arguments that were espoused was that it was so dangerous and far-reaching and no one knew what the courts really would do. Now you have confidence that the courts will do the right thing in this case but you didn't in the other. So I would assume it's just a matter of opinion.

REPRESENTATIVE RISH: No, that's Senator Barron that made that argument. My argument was that I didn't know what Congress would do with it. I wasn't worried about the courts.

SENATOR SCARBOROUGH: I don't recall whether it was yours or Senator Barron's. But the point being that no one can predetermine or judge what the courts will do and we can't second guess the courts.

REPRESENTATIVE RISH: No, sir. But under any given set of circumstances I put my money on the court doing what is right.

MR. CHIEF JUSTICE: Senator Chamberlin.

SENATOR CHAMBERLIN: Mr. Chief Justice, thank you. With reference to Article III, Section 17(b), if the motion to dismiss is judged on a jurisdictional—on the question of jurisdiction, would this constitute acquittal?

REPRESENTATIVE RISH: I thought you said the Chief Justice.

SENATOR CHAMBERLIN: Mr. Chief Justice or anyone who would—

MR. CHIEF JUSTICE: I am going to advise you on the law. I'm going to ask that you ask your questions at this time to counsel representing either the House or Mr. Jacobs.

SENATOR CHAMBERLIN: Then on a separate question, Mr. Rish, does Statute 121.091 which sets forth the criteria for deprivation of pension benefits, is it your opinion that Judge Smith's case is covered by 121.091 or is the point that this impeachment is necessary to qualify him for the deprivation of benefits?

REPRESENTATIVE RISH: It's my opinion that the impeachment coupled with that will deny him the benefits.

SENATOR CHAMBERLIN: Is it your opinion that 121.091 does not cover the case of Judge Smith?

REPRESENTATIVE RISH: Please let me look at that. Senator Chamberlin, would you give me that subchapter again?

SENATOR CHAMBERLIN: 121.091.

REPRESENTATIVE RISH: Ask your question again.

SENATOR CHAMBERLIN: It's Page 541 if that will help you.

REPRESENTATIVE RISH: Now, Senator, if you would ask your question again.

SENATOR CHAMBERLIN: On Page 541 at the very last paragraph in the right-hand column, sub f, the question was in your opinion does Judge Smith's case fall under the provisions of that paragraph of deprivation of benefits?

REPRESENTATIVE RISH: I'm not sure that it would without impeachment.

MR. CHIEF JUSTICE: Senator Williamson.

SENATOR WILLIAMSON: I just want to ask Representative Rish a question. Mr. Rish, in neither brief is there any mention of Article XIII of the United States Constitution which says neither slavery or involuntary servitude shall exist within the United States. And one of the positions that you take is that the Governor can refuse a resignation under these circumstances. How do you square that with Article XIII of the U. S. Constitution?

REPRESENTATIVE RISH: Article XIII, I think, requires some affirmative act for involuntary servitude and the fact that the man is not serving, not working, nobody has got a gun on him making him still sit on the bench. So that's a matter—it takes an affirmative act to hold a person in involuntary servitude. In my judgment.

MR. CHIEF JUSTICE: Senator McClain.

SENATOR MCCLAIN: Mr. Rish, when you got two decisions, you have got one, I think, in 1938 case that says that unilateral resignation is valid and then you have got another case that says the resignation must be accepted. As a matter of stare decisis, which controls?

REPRESENTATIVE RISH: The latter case.

SENATOR MCCLAIN: So if we are to follow the law of the Supreme Court we must follow the later case?

REPRESENTATIVE RISH: Yes, sir.

SENATOR MCCLAIN: Is there any real dispute among jurists as to that principle?

REPRESENTATIVE RISH: Sir, not that I know of.

SENATOR MCCLAIN: I would hope that the Chief Justice would enlighten us on that.

But assuming that unilaterally you can resign even though the latest case says it must be accepted, would you not agree that the Constitution of the State of Florida, the very last section there towards the last, says, "... and in the discretion of the Senate may include disqualification to hold any office for honor, trust or profit." Assuming that even if you did have a valid resignation which is a serious question in my mind other than the Supreme Court case that we are going to follow the law of the Supreme Court on, jurisdiction, and this is all we are here for, still would vest for that last provision which we would exercise in our discretion.

REPRESENTATIVE RISH: Senator, if I believe anything in my heart this morning, I believe that what you have just said is absolutely correct. As far as jurisdiction is concerned, the last point only gives the Senate jurisdiction if it wants jurisdiction. If it doesn't want it, it doesn't have to take it.

MR. CHIEF JUSTICE: Senator Tobiassen.

SENATOR TOBIASSEN: Mr. Rish, I appreciate Senator Wilson's questions. Maybe it's because I understood it better in her non-attorney language. But the question that she raised, I believe, and I may be asking the same question again, is about three years ago when Mr. Christian and O'Malley and Judge McCain, I believe it was, they had committed improper acts while in office and they submitted their resignations and it was accepted by the Governor.

Yet in this situation Mr. Smith has committed acts while in office and submitted his resignation and it was not accepted by the Governor and in the case of the other gentlemen, it was decided not to go through a Court of Impeachment with them but it has been decided to go through a Court of Impeachment with Mr. Smith. Am I incorrect in viewing this as a situation where the Governor is allowed to pick and choose whose resignation will be accepted and or are we as a body allowed to sit here and pick and choose who we will impeach and who we will not impeach?

REPRESENTATIVE RISH: Senator Tobiassen, the Governor has that right subject to Senator Scarborough's abuse of discretion question that they can pick and choose, I think. He did not, as a matter of indiscretion, pick and choose without some rational basis in his mind. I was a party to most of those resignations, not very pleasantly but I was. Those resignations were only accepted, Senator Tobiassen, when there was an assurance that there would be no pension benefits received or anything else drawn other than what the people had in the State till.

With Mr. O'Malley there was a slip-up. He got his pension. Added to the Senator's second part of this there are two questions. One is whether or not he gets his pension and the other is whether or not he ever holds future office, that gives you jurisdiction, you pay your money, you take your choice.

The answer is yes, you can pick and choose. You can pick and choose to try him on impeachment, you can pick and choose not to and that's the decision you've got to make.

My point is you have that authority if you want it.

SENATOR TOBIASSEN: But, Mr. Rish, it doesn't quite seem fair, were the crimes of Mr. Smith greater than those of Mr. Christian and McCain and the others, you know, and I can't see how it would be fair for one and not for another?

REPRESENTATIVE RISH: Senator, I've drawn the distinction and I suspect that if there were a stipulation not only that he would not ever hold office but that he would relinquish and release all rights to any stipends or anything else from the State of Florida upon being paid what he has put into the system and we could do that adequately under a declaratory decree, we might be able to find that there was some reason why you couldn't choose one and don't pick and choose another. Here, again, that's the best answer I gave Senator Wilson, it's the best one that I can give you.

MR. CHIEF JUSTICE: Senator Childers.

SENATOR W. D. CHILDERS: Mr. Rish?

REPRESENTATIVE RISH: Yes, sir.

SENATOR W. D. CHILDERS: Not being an attorney and sitting here and waiting until finally we can cut through the icing and get to the cake and being able to understand now what is really going on. I have talked to some attorneys in the Senate and estimates on the length of the trial vary from a few weeks to a few months. The cost of the trial which will be borne by the taxpayers of Florida vary from 50 to 60 to 100 thousand dollars, up to a quarter of a million dollars. Maybe one-half million dollars. I don't know.

Having worked on the budget until the early hours of the morning, being compelled to work on the budget all weekend, I'm a cost man. And so not as an attorney but as just a private citizen I made one observation.

Is this the brief submitted by the House?

REPRESENTATIVE RISH: Yes, sir.

SENATOR W. D. CHILDERS: Is this the brief submitted by Mr. Jacobs?

REPRESENTATIVE RISH: I believe so. Yes, sir.

SENATOR W. D. CHILDERS: Members of the jury, I want you to look at the two briefs. This is printed by a printer in script and scroll, well-bound, plastic cellophane over the front, very smooth to the touch.

The one submitted by the public is on the cheapest—by the Respondent, the one submitted by the Respondent is on the cheapest kind of paper you can buy. It's mimeographed. You look over on the edges of it you will see it looks like it was originally a piece of notebook paper, they have got holes where if they had the punch they would have punched one but it's not punched, it's stapled. I almost stabbed my little finger.

MR. CHIEF JUSTICE: Senator Childers, I'm going to ask you to ask him a question—

SENATOR W. D. CHILDERS: The question is—do you estimate the cost as Senator Barron has stated, and I think, Mr. Chief Justice, I'm sorry for getting off on this, but I think it could be an example of what we might face in the future as far as the cost to the taxpayers.

Is there a possibility that he could get his pension even if we impeach him?

REPRESENTATIVE RISH: Is there that possibility?

SENATOR W. D. CHILDERS: Yes.

REPRESENTATIVE RISH: I would say there is always that possibility. Yes, sir.

SENATOR W. D. CHILDERS: Is there a possibility that we could spend more taxpayers' dollars in trying him than the pension would be?

REPRESENTATIVE RISH: Senator Childers, only the good Lord could answer that question. I hope, you know, I can't get in that class with you. If you can figure out how long he's going to live and how much he's going to draw, I could estimate maybe how much the trial was if you were going to do it since you have done put me in that tax and spend bracket with the liberals, you know, and I have got that philosophy in the other end of the House, as you well know. But I just can't tell you how long Judge Smith is going to live or how much increase percentage we are going to give the inflationary every year to those who draw. I would be glad to, if the Senate decides to go forth with the trial, I will be glad to try to estimate the cost of it.

SENATOR W. D. CHILDERS: But at this point you could not even speak to the possibility; is that correct?

REPRESENTATIVE RISH: Of the amount of the cost?

SENATOR W. D. CHILDERS: Yes.

REPRESENTATIVE RISH: Yes, sir. We had hoped that, of course I don't know who you have talked to about the estimates about how long the trial would go on. You have not talked to me about it. I don't know who you have talked to about the estimates of the amount of the cost. You have not talked to me and my committee about it.

SENATOR W. D. CHILDERS: Well, I'm asking you now.

REPRESENTATIVE RISH: All right, sir. I would estimate that the maximum cost would be about 40 or 50 thousand dollars.

SENATOR W. D. CHILDERS: How long would you estimate the trial to—

REPRESENTATIVE RISH: I can't tell you how long it will take to put theirs on but I think that in four or five or six days we would have put on all we needed. We did it in about three sessions in the House, two to four hours each, where we used tapes and the transcripts and the live witnesses. But I would say four or five days for ours.

SENATOR W. D. CHILDERS: But you would not venture a guess as to how long the Florida Senate might sit as a Court, might be here as a Court of Impeachment?

REPRESENTATIVE RISH: No, no, sir. I would never try to predict what the Florida Senate is going to do in length of time or anything else.

SENATOR W. D. CHILDERS: How about the cost, you would not—\$40,000 is certainly not a cap, you didn't indicate that.

REPRESENTATIVE RISH: No. I would say that I would hope that it would be that or less.

SENATOR W. D. CHILDERS: I would like for it to be a dollar.

REPRESENTATIVE RISH: Well, I would, too, and if we could make it that, you and I both, you know that I agree with you on that philosophy, Senator Childers.

SENATORS W. D. CHILDERS: Well, I know that you are the attorney and you have got to do these things and I'm not an attorney and I guess I have the liberty to ask these questions.

Mr. Rish, is the judge in office now?

REPRESENTATIVE RISH: He is not actively sitting on the bench at this time. He is still a member of the judiciary so far as being an officer.

SENATOR W. D. CHILDERS: If this body does not vote to impeach him, what would his position at that time be?

REPRESENTATIVE RISH: It would depend on what the JQC and other people did if he was not removed, he could go back to office as the Governor didn't accept that resignation.

SENATOR W. D. CHILDERS: Thank you, sir.

MR. CHIEF JUSTICE: Senator Vogt.

SENATOR VOGT: Mr. Rish, going back to the Florida Constitution, Article III, Section 17 provision that we may remove an offender from office and in the discretion of the Senate may also include disqualification to hold any future office.

REPRESENTATIVE RISH: Yes, sir.

SENATOR VOGT: And in the Ferguson case where a governor had resigned but the Senate impeached him anyway and he went ahead and wanted to run later and the courts ruled that since the Texas, I believe that was the Texas Constitution, had included in there the impeachment could not only remove him from office but also disqualify him from future office, the courts ruled that he could not resign in the 11th hour to escape impeachment and the Legislature had within its prerogative the ability to go ahead and impeach and prevent him from holding future office.

Let me ask you, if the convictions of the judge are overturned could he hold office again in the State of Florida?

REPRESENTATIVE RISH: There is a good possibility that he could.

SENATOR VOGT: Some other office?

REPRESENTATIVE RISH: Yes, sir.

SENATOR VOGT: Either this one or some other office?

REPRESENTATIVE RISH: Yes, sir.

SENATOR VOGT: If the convictions are upheld could he hold any other office or is the nature of them such that they—

REPRESENTATIVE RISH: My best thought would be that probably he could not, probably he could not.

SENATOR VOGT: Probably he could not. Would you say our taking this up in a timely fashion, under whatever time we chose, but let's say a timely fashion now would be the exercise of the legislative prerogative to judge for itself apart from the courts whether or not a public officer could hold office now or at any time in the future?

REPRESENTATIVE RISH: Absolutely, Senator Vogt. But let me caution you about the time frame. It's my judgment that the House could have their articles at a later date, but we didn't, we brought them as soon as we were satisfied that probably cause existed. Now the Constitution says that once you do that then you must try it within six months.

SENATOR VOGT: So if this Senate did not take up the impeachment and try it within six months of the House bringing Articles of Impeachment that would lay the matter of impeachment to rest; is that correct?

REPRESENTATIVE RISH: That is correct.

SENATOR VOGT: Could the House subsequently present Articles of Impeachment again and the time start tolling again?

REPRESENTATIVE RISH: Sir, I have not researched that and I'm not sure.

SENATOR VOGT: Would you say since, in your opinion, if the history of the Legislature shows that we are loath to impeach at all and certainly when the courts have not found some wrong-doing, then several possibilities could occur. If his convictions—if the Senate chose to not impeach now and the convictions were subsequently overturned, as a matter of history, doesn't it seem likely that this Legislature would have abandoned its decision to decide for itself on the question of impeachment and removal from office?

REPRESENTATIVE RISH: I would rather not speculate on an answer to that. Each Senator and Representative would have to make up his own mind about what he could do.

SENATOR VOGT: One further question. Would you say that if the Legislature did not impeach now and a subsequent Governor or this Governor or any subsequent Governor chose to accept his resignation that such would materially weaken the chances of a legislative body impeaching him?

REPRESENTATIVE RISH: As a practical matter, I would say yes. As a legal matter, my argument would be that it would make no difference.

SENATOR VOGT: Mr. Justice, while I have the floor, could I ask Mr. Jacobs a question?

MR. CHIEF JUSTICE: Proceed.

SENATOR VOGT: Mr. Jacobs, a few minutes ago Senator Gallen asked a question about a judge retiring, let's say committing an impeachable offense and then retiring and then later on there was a question about whether or not the Chief Justice could—is there any distinction in your mind—two questions.

One, can you tell me what the legal distinction is between retirement and resignation and is there any distinction in your mind on the question of impeachment of an officer whether he has retired or resigned? Does that affect—do you think retirement or resignation affects the ability of the Senate to try someone and as a part of that if the State, if his retirement had—his application for retirement back in January of '77 or early 1977 had been accepted by the Division of Retirement, I assume he would have been retired at that time, that would have precluded, maybe we wouldn't even have needed a resignation, so can you elaborate a little bit on the distinction between retirement and resignation and what effects they have on impeachment?

MR. JACOBS: I did research this point in connection with the previous case. A judge out of Miami sought to resign as opposed to retire at a time when the law did not allow a judge to retire and practice law. And he sought to resign and there was a distinction drawn between that. I just don't remember when it was. But there is a case on that point that we can find and make available to you. I don't have it at my finger tips.

On the question of the resignation in this particular instance we have attempted to do everything and make everything applicable to Mr. Smith that would be applicable to him if he were impeached, with the exception of his pension. And we have offered to do that and if there—so that insofar as this case is concerned, his resignation is absolute and forever and is absolute and forever a bar against him performing any public service or participating in any public service as an appointed or elected public official or as a recalled judge. So that we respectfully waive by whatever way we can do it without regard to whether there is a distinction between a resignation and the retirement which I'm not sure that there is.

The resignation, though, I think your position ought to be, I would hope that your position is, that a resignation may be unilaterally submitted and it must have accepted whatever other detriments the person has, he has to suffer those, but that his status as a public official ceases at that point.

SENATOR VOGT: I just have one other question on that line.

MR. CHIEF JUSTICE: Let me interrupt the question just one minute. I need to recognize Senator Plante.

SENATOR PLANTE: Mr. Chief Justice, I want to make a motion.

MR. CHIEF JUSTICE: You may make the motion.

SENATOR PLANTE: I move that the time for adjournment be extended till 1:00 o'clock.

MR. CHIEF JUSTICE: You have heard the motion. All those in favor signify by saying aye.

THE SENATE: Aye.

MR. CHIEF JUSTICE: The motion carries. I have Senator Lewis and Senator Poston. At the conclusion of the questions, as I advised previously, I will advise you on my viewpoint of the law. I think somewhere in the matter of the questioning some of you have made your positions or have made statements of your respective positions in this regard but I would hope that before this Court of Impeachment recesses today that this particular issue will be disposed of. Senator Vogt.

SENATOR VOGT: Well, then, if his retirement had been accepted, in your opinion, his retirement of the same finality and removal from jurisdiction, let's say, as you consider resignation to be and therefore he would have been beyond the reach of impeachment, in your opinion? If his retirement had been accepted?

MR. JACOBS: If his retirement had been accepted, would he have been beyond—

SENATOR VOGT: Would he have been beyond impeachment?

MR. JACOBS: I don't think so, not prior to his resignation. The resignation is what has made him cease, in my judgment, to be a public official.

SENATOR VOGT: So when somebody retires do they also resign?

MR. JACOBS: They may. They may, although they may retire without resigning.

SENATOR VOGT: Are you making a distinction then that a public officer who retires from a public office is forever liable to impeachment proceedings for actions while he was in the public office?

MR. JACOBS: No, sir. But there are instances, and especially a judge, I believe, where if he were to retire he would continue to be available to serve under certain circumstances with the consent with the consent of the Chief Justice and with the consent of the individual retired judge. So a judge who has retired might continue to be a public official until such time as he resigned. When he resigns that would cease his position as a public official.

In my argument of course, the State, the Managers, would argue that he never loses that capacity.

SENATOR VOGT: Would you say then that in your motion to dismiss that the argument that he had submitted voluntary retirement or disability retirement, I believe it was, would you say then that is relevant to the question of impeachment, if retirement does not remove him from impeachment?

MR. JACOBS: No, sir. Because that was put in for the purpose of demonstrating that he had done everything within his power to divorce himself from the judicial position that he had previously served. He had done everything conceivable to do except waive his pension. He has done everything else and anything that he hasn't done he has offered to do and it's not been accepted.

MR. CHIEF JUSTICE: Senator Ware.

SENATOR WARE: Mr. Rish, the section of the statute, Chapter 121 with regard to retirement benefits says a member, speaking of the retirement system, who is found guilty by the verdict of a jury of committing certain offenses which include bribery shall forfeit all of his rights and benefits under this chapter except for the return of his accumulated contributions. Has Judge Smith been charged and found guilty of bribery?

REPRESENTATIVE RISH: I don't believe that that's one of the charges. No, sir. Mr. Jacobs advises me that that's not one of the charges he has been charged with.

SENATOR WARE: Has he been found guilty of any of the enumerated offenses in Chapter 121 which would result in the loss of his retirement benefits in the event he lost his appeal?

REPRESENTATIVE RISH: I don't believe he would without impeachment. I don't think I answered this earlier. I don't believe, Senator, that this impeachment would catch him without impeachment. No, sir, I don't believe so.

SENATOR WARE: Article III of your impeachment articles indicates that he was—that he was impeached on the basis of bribery. What was the basis of that argument? Attempted bribery of the officers of the State of Florida to influence the performance of their duties.

REPRESENTATIVE RISH: Senator Ware, may I speak to Chief Justice Overton? Mr. Justice, I'm going to have to go into the merits of the cause to answer this question and I will be glad to attempt to do that if that be the wishes of this court. But that really goes to the merits of what our charges and allegations are.

SENATOR WARE: Mr. Rish, that may well be true but I think it needs to be stated.

REPRESENTATIVE RISH: I'm perfectly willing, Senator Ware, if the Court tells me that it's appropriate to do so at this time.

MR. CHIEF JUSTICE: For the limited purpose of answering the particular question but as it goes to the matter of jurisdiction of this particular impeachment court; that's the issue before this court at this time is whether the Senate sitting as a Court of Impeachment has jurisdiction to proceed with this particular proceeding.

REPRESENTATIVE RISH: Stop me if I go astray, please, and let me see if I can answer.

Senator Ware, there appears to be evidence and testimony that would say that there were certain statements made to certain other officials about certain dividends, divisions and monies to be divided and that's what that article is based on.

SENATOR WARE: But there has been no conviction in the State Court?

REPRESENTATIVE RISH: No, sir.

SENATOR WARE: Or Federal Court?

REPRESENTATIVE RISH: No final conviction in the Federal Court.

SENATOR WARE: All right. One further question. From the prior statement I asked Mr. Jacobs, what is your opinion of the length of time within which a charge could be brought against an official, officer?

REPRESENTATIVE RISH: Well, the longest that I can recall that I know of and it was in another jurisdiction, which was Texas, was six years later; they got back into the matter at that time as to the validity of it. A reasonable period of time and I think here again it would depend upon the reasonableness, and it would depend upon why the Senate might be bringing impeachment at that time. There is no statute, no constitutional provision relating to time anywhere that I know of except the six months provision that's required for you to try our articles or dismiss them.

SENATOR WARE: Thank you.

MR. CHIEF JUSTICE: Senator Lewis, you may proceed.

SENATOR LEWIS: Thank you. Mr. Rish, it may take a while to get around the mulberry bush to make a point. In the comments that have been made today while there has been mention of the pension question it has been alluded to that would be settled in court, that would be settled in other places and at another time. On this jurisdictional matter it appears to me that we are in a Catch 22. If we take jurisdiction and if we go through that proceeding and if we were to impeach the judge, it would appear that he would lose his pension.

Now if you look at the dates, my first question directly is what did you raise the question on, was it the Statutes or the Constitution as to the pension question?

REPRESENTATIVE RISH: Thank you, Senator. If you will look at Florida Statute 121 Sub 5 Sub (g) it says, "Any elected official who is convicted by the Senate of an impeachable offense shall forfeit all rights and benefits under this chapter except the return of his accumulated payments."

SENATOR LEWIS: What was the effective date?

REPRESENTATIVE RISH: I'm not sure that I can tell you offhand. I can find it.

MR. CHIEF JUSTICE: July 1975.

REPRESENTATIVE RISH: '75, I believe, July '75.

SENATOR LEWIS: Mr. Jacobs had mentioned that the Constitution preempted that statute. Did you feel that way?

REPRESENTATIVE RISH: No, sir.

SENATOR LEWIS: All right, Because it seems to me when I look at this thing here and see the dates, the date of his arrest was in November of 1976. The effective date of the Constitution was, if you want to give it the exact date of the election was just a few days earlier in the early part of November.

REPRESENTATIVE RISH: Senator Lewis, the real nut in the coconut, the difference between Mr. Jacobs and me, I think this is true, he argues that the Constitution will keep this section from being operative. It's our position that this is an independent statute, does no damage to any constitutional provision.

SENATOR LEWIS: Well, the question on Christian then now when he got his pension, as I recall in the courtroom they went through that, he had earned that and rested and therefore whatever that action was couldn't be taken away from him unless he voluntarily did.

REPRESENTATIVE RISH: There was no law covering it at that time, Senator Lewis.

SENATOR LEWIS: Now to the extent that the judge was involved in that, was that law in effect when all of these actions that he allegedly did?

REPRESENTATIVE RISH: This statute wasn't passed for Judge Smith, if that helps you.

SENATOR LEWIS: No, no. That's not my question. Was it in effect?

REPRESENTATIVE RISH: Yes.

MR. CHIEF JUSTICE: Senator Poston.

SENATOR POSTON: Mr. Chief Justice, I just wanted to make an inquiry of the Chair. I know that we are here and we are discussing today jurisdiction, whether the Senate has jurisdiction to be over this particular proceeding. Would you restate for us again precisely at what point—well, you won't know what point we are going to put something to a vote. But would you state precisely what the issue is that we will be voting on at an appropriate time?

MR. CHIEF JUSTICE: Senator Poston, what you will be voting on is whether or not you presently have jurisdiction to proceed to hear this case on the merits. The issue that is raised by the motion, Mr. Jacobs, if I misstate it, please advise me, but the issue that is raised is that the Respondent Samuel Smith was not an officer subject to impeachment. The issue that's before you is whether you have jurisdiction to proceed, to hear this impeachment proceeding on the merits.

SENATOR BARRON: Mr. Chief Justice, I would beg to disagree with you on that. The motion is that he has resigned and he is no longer an officer and I think the issue before us is that true, and then do we want to go ahead now and try to put him out of office. Certainly we have jurisdiction. There is no question about that.

MR. CHIEF JUSTICE: Senator Barron, I think that my comments as to what it was is more or less stated in the issues and the matters of the prior impeachment trials before the United States Senate and the issue was whether or not he was in fact an official subject to impeachment.

SENATOR BARRON: Mr. Chief Justice, I must again remind you that we are not in the United States Senate or the United States Court. We are in the Florida Senate and the issues are set out clearly and they don't talk about jurisdiction except one of them.

We could grant the motion on the grounds that he's out of office, on the ground that he's not any longer an officer as argued by Mr. Jacobs and that he's no longer a threat to the people of Florida and we would do that under jurisdiction that we have here. That's the only way we can act is by being here.

MR. CHIEF JUSTICE: Senator Barron, let me go ahead and proceed to advise the Senate at this time as to what my views are and then I think it would be appropriate for the Senate to proceed to debate the issue.

SENATOR BARRON: Yes, sir. May I address the Court on that point?

MR. CHIEF JUSTICE: Yes.

SENATOR BARRON: Is there any precedent for the presiding officer in an impeachment proceeding to express his views as to the law?

MR. CHIEF JUSTICE: Yes, sir. It was done the last time by Justice Drew and another, the matter of the sufficiency of the Articles of Impeachment by Richard Kelly.

SENATOR BARRON: Well, I would urge you not to address your views of the facts raised here in that you might tend to prejudice the case one way or the other.

MR. CHIEF JUSTICE: Senator Barron, I understand and agree that I should not comment to the Senate on the matter of my opinions on the merits or on the facts of the case. But my advice to the Senate must only be upon the law and I sitting as the presiding officer in this proceeding as the Chief Justice only have the authority to advise you on the law and of course have no authority to vote on either matter of law or a matter of fact. Senator Scarborough.

SENATOR SCARBOROUGH: Mr. Chief Justice, considering the question by Senator Poston, I have been concerned this morning as probably many of the lay non-lawyer members of the Senate as to some point in time, as Senator Poston said, we're going to have to vote on something. Reading the motion as you have asked us to do on Page 36, the motion is that the Senate sitting as a Court of Impeachment dismiss the Articles for certain reasons. So I assume you will couch the question in a manner that will somehow be if you favor dismissing, you will vote "yea", and if you otherwise, "nay" and that will require a majority vote; is that a fair assumption?

MR. CHIEF JUSTICE: That is correct, Senator Scarborough, at this stage of the proceeding a majority vote governs.

SENATOR SCARBOROUGH: Then I am correct in my assumption that if 21 members of the Senate decide today to dismiss it then that would be the end of it and it would be up to the Governor from that point?

MR. CHIEF JUSTICE: That is correct.

SENATOR SCARBOROUGH: Thank you.

MR. CHIEF JUSTICE: Senator Holloway.

SENATOR HOLLOWAY: Mr. Chief Justice, has there been any investigation by the Judicial Qualifications Commission into this particular case?

MR. CHIEF JUSTICE: Well, Senator Holloway, I'm going to rule at this time that that goes beyond the particular issue that we have before us on the matter of jurisdiction. I think the record reflects in the briefs the chronological order of what has occurred in the matter and, again, that shows that there has been a finding of probable cause made by the Judicial Qualifications Commission and there has been a recommendation made by the Commission to the Supreme Court to suspend the Respondent without pay and an order of the Supreme Court has been entered on that particular matter. That is the status of that matter at this time and that it does appear in these proceedings and in the records and in the exhibits that have been filed here.

SENATOR HOLLOWAY: Did I understand you to say, sir, that it is appropriate for me to ask then if the recommendation was for removal from office of the justice?

MR. CHIEF JUSTICE: Senator Holloway, there has been no—there was a finding of probable cause made by the Judicial Qualifications Commission and a recommendation of suspension without pay pending further proceedings in the Judicial Qualifications Commission.

SENATOR HOLLOWAY: Thank you, sir.

MR. CHIEF JUSTICE: Members of the Senate, I have read the briefs as extensively as I can possibly do. In addition, I have tried to read at considerable length the precedents and authorities concerning the purpose of impeachment proceedings. And as you know there have not been that many impeachment proceedings in this state nor have there been really that many

in the United States Senate. But included in my reading were the Federalist Papers as they pertain to the impeachment article in the United States Constitution.

In Jefferson's manual on impeachment an indication to the impeachment cases, most of which have been cited to you by counsel for both parties.

My legal views do not for the most part have their same basis as counsel for either the Respondent or the House. In applying the true intent and purpose of the impeachment provision of our constitution and construing it as I believe the framers intended it, it is my view that you have jurisdiction to proceed with the impeachment of these proceedings under the specific facts of this case as they are set forth in the Articles of Impeachment.

Let me say this to you, our constitutional provision as it is in the present Constitution is almost identical to the impeachment provision as it pertains to judgment in the Constitution of the United States. And they are short, and if I may I would like to read them to you.

Our constitutional provision reads as follows: "Article III Section 17. Judgment of conviction in cases of impeachment shall remove the offender from office and in the discretion of the Senate may include disqualification to hold any office of honor, trust or profit. Conviction or acquittal shall not affect the civil or criminal responsibility of the officer."

The Constitution of the United States, Article I, Section 3 provides: "Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States. But the party convicted shall nevertheless be liable and subject to an indictment, trial, judgment and punishment according to law."

What these words mean and what did the framers of the original Constitution mean when they inserted them in the United States Constitution? In my view, this can be found in part from the words of Alexander Hamilton, they're contained in the Federalist Article 65 under the date of March 7, 1788.

He was explaining at that time to the people of New York the impeachment powers of the Senate in the proposed constitution. He expressed in his words what impeachment was and what it was not.

He said, first, the subjects of its jurisdiction are those offenses which proceed from the misconduct of public men or, in other words, from the abuse or violation of some public trust. He went on and then said what the punishment was.

He said this: "The punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender after having been sentenced to a perpetual ostracism from the esteem and confidence, the honors and the emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law."

Those are the words of Alexander Hamilton written on March 7th, 1788.

In my opinion the intent of a judgment of impeachment was of course to remove an individual from office and also that that removal included the emoluments of that office. Emoluments have been defined in the courts as being any prerequisite, advantage, profit or gain arising from the possession of an office.

In my view the retirement benefits furnished by this State is an emolument of office. The United States Senate has on

occasion terminated an impeachment upon a resignation and on other occasions has proceeded to hear the case on the merits where a resignation has been effected.

I recognize in reading those particular cases that none of those resigned officers who were tried on the merits were ever convicted. But I believe it is also important to note that nowhere in the records of those proceedings does it appear that those resigned officers retained any benefits or emoluments of their offices.

That fact, of course, is present in these proceedings. My view does not reach, frankly, the issues argued concerning the acceptance or rejection of the resignation by the Governor or the matter of the conviction of the crime.

With regard to the acceptance or rejection of the resignation I do believe that you have the authority to proceed if you so desire. There is no firm precedent on that point.

In the one case that was argued or was mentioned to you, I might say that the Senate of the United States was in session from May 4th to May 29th on that issue. The United States Senate has also considered case on the merits after resignation and has in other instances as I stated, terminated proceedings upon the resignation. Although, and I might say this, there was concern about such termination by members of the Senate and one of the most recent cases was in 1925 and in that instance I guess I can best explain to you the concern that the Senate had at that time as it pertains to the impeachment of Judge English.

There was a concern because he had resigned and the House had adopted a resolution that the impeachment proceedings be terminated. The matter was before the Senate as to whether or not they would accept. They did accept but I should read to you one of the comments, it is printed in the brief, of the Senator from Florida at that time, Senator Fletcher.

He said this, basically right on this particular issue. Mr. Fletcher: "I expect to vote on this order. I want it distinctly understood, however, that it shall not be regarded as a precedent which will bind the Senate hereafter in all cases of a similar character. I shall vote for it with the understanding that each case is to stand upon its own merits as it may be presented here without conceding that this shall establish a precedent and that hereafter whenever an impeachment of a Federal judge is presented to the Senate if he resigns during those proceedings that will end the matter. With that understanding that each case stands upon its own merits in view of the action taken by the House in this particular case which I understand is based upon their consideration of all of the facts and circumstances in connection with the matter, I propose to vote for the order."

There was considerable discussion concerning that matter of whether or not the Senate in that case should cease and terminate the proceedings.

I feel that you do have the authority to proceed in these proceedings on the merits and I do advise you that under my interpretation of the law you may properly deny the motion to dismiss and proceed in this matter to a trial on the merits.

Senator Hair.

SENATOR HAIR: Mr. Chief Justice, at this time I would like to make a motion that the Senate do deny the motion to dismiss filed by the Respondent.

MR: CHIEF JUSTICE. All right. Let me ask as to this. I think probably it would be best to line up a debate or discussion on the motion. If I may have those that desire to speak.

Senator Myers.

SENATOR MYERS: Mr. Chief Justice, to your last remark you indicated that we could properly deny the motion to dismiss. I would like to ask you could the motion to dismiss be properly granted without establishing any precedent in any future case on the question of what is a valid resignation or an invalid resignation? In other words, could we grant the motion to dismiss on the same grounds that Senator Fletcher did that you quoted in your excellent quote, that this is without precedent in any future case?

MR. CHIEF JUSTICE: I see no reason why the Senate if they so desire could not do so. I might say I didn't count up the number of Senators that made a similar statement in that proceeding but there were a number. The order, however, itself, did not express that.

Senator McClain.

SENATOR MCCLAIN: Mr. Chief Justice, you avoided the issue as to the validity of the resignation and as far as instructing it, I have a difficulty understanding that because we have got two cases, apparently one going one way and one going the other. One an 1838 case that seems to uphold unilateral resignation and we have a subsequent case indicating that the resignation is not valid unless accepted. And I'm really in a quandary which decision controls.

MR. CHIEF JUSTICE: Senator, I addressed the issue as to whether or not the resignation, assuming the resignation was accepted, terminated—would terminate the impeachment proceedings. So that the issue as to whether or not it was accepted or rejected was not an issue that I considered. Assuming that the resignation was accepted, my view would not change. Senator Lewis.

SENATOR LEWIS: I may want to make some comments. I don't want to be put down on the list, I don't want to be precluded from it, though.

MR. CHIEF JUSTICE: Let me say this. I would like to see if there is some semblance, I think, in the matter of order in the presentation. Senator Dunn.

SENATOR DUNN: Mr. Chief Justice, I would like to move a substitute motion. I would like to move as a substitute that the motion to dismiss filed by the Respondent and served on May 18th, 1978 be dismissed as to grounds asserted in Paragraphs 1, 2 and 3.

MR. CHIEF JUSTICE: Senator Dunn, let me ask you this, and as I read the rules of the Senate, Rule 7.3 concerning the matter of substitute motions has not been adopted as the rules of this impeachment court. So we have the matter of the—we have the matter concerning an issue that's before the Court on a motion. Now I think we have to address that motion, we have to address that motion to dismiss.

SENATOR DUNN: Point of inquiry, then. My reason for moving as a substitute or as—the way the motion was stated, it seems to me it would embrace the fourth paragraph of the motion which in three subparagraphs goes to the assertion that our acts here are null and void because of the denial of due process and it raises a question of inadequate counsel and indigency, neither of which have been argued today; by the expressed admonition from the Chair counsel did not go into those matters. I would like to not see the Senate go on record against those grounds until we have had a change to understand the position of both parties with respect to them.

MR. CHIEF JUSTICE: Senator Dunn, your point is well taken. I'm going to deal with it as a point of order rather than a motion. Senator Hair, you didn't intend to get into the matter of due process, did you, with your motion?

SENATOR HAIR: No, sir.

MR. CHIEF JUSTICE: Do you agree that the motion that you presented only goes to grounds 1, 2 and 3?

SENATOR HAIR: That's correct.

MR. CHIEF JUSTICE: Any further discussion? Senator Henderson.

SENATOR HENDERSON: Yes. Would you tell me what vote is required to adopt such a motion?

MR. CHIEF JUSTICE: A majority vote, Senator Henderson. Senator Glisson.

SENATOR GLISSON: I would just speak on the motion that we do accept the jurisdiction. Would that be proper?

MR. CHIEF JUSTICE: All right. You can go ahead and speak, Senator Glisson.

SENATOR GLISSON: All right. I think we should accept the jurisdiction because basically I think in a case like this if, this is based on if the articles from the House are accurate and if the findings are accurate, that we should sever all relations with this particular public official and the only way we can sever all relations between the State and this official would be through the impeachment process.

Now to allude to it, I don't know whether it would be proper at this point to go into some of the charges or some of the findings of the House but I think there is going to be a great inconsistency in what the Florida Senate does to the law making process to the average person and then whether we are going to deal with a public official. Because if I could just very briefly, one of the findings in the Articles from the House alludes to more than 1500 pounds of marijuana and that's about the weight of this desk.

What we are doing in Florida today with about the weight of this pencil we are putting 16 and 17 and 18 year old kids in jail for two and three years. So I think this is a matter we should look at, we should accept the jurisdiction and I think to do otherwise would be inconsistent with the philosophy of the Senate and what we are doing. The cost should not be a factor because when we look at other important matters in Florida, I don't think we look at the cost and regardless of the cost and time, we should go ahead and look at this matter and accept the jurisdiction.

MR. CHIEF JUSTICE: Senator Chamberlin.

SENATOR CHAMBERLIN: Mr. Chief Justice, are you preparing a list or I was just trying to—

MR. CHIEF JUSTICE: Well, I didn't get anybody that was willing enough to really put up their hands so I'm just calling on the individuals as they tell me they are ready to say something.

SENATOR CHAMBERLIN: I would like a few moments, but I would like to speak against the motion.

MR. CHIEF JUSTICE: You may do so now.

SENATOR CHAMBERLIN: I believe from what I have heard that we cannot determine with the certainty the legal precedents of whether impeachment should proceed in light of a resignation. There is nothing that has convinced me that we have heard of a substantial and preponderant and penetrating order that we cannot—that we should proceed in light of the resignation. I have heard the statement that each case stands on its own merits. It seems to me that is the way it should be.

Two further issues. Whether short of impeachment a public official can be restrained from public office. I would ask you

to look at the Florida Constitution in Article III, Section 17(b) where it says: "Any officer impeached by the House of Representatives shall be disqualified from performing any official duties until acquitted by the Senate."

I asked for a ruling on whether or not the granting of the motion to dismiss constituted an acquittal? I haven't—I either missed the ruling or didn't understand it but I would say there is grounds to assert that short of acquittal that the person is restrained from holding public office under the Florida Constitution.

In addition, we have the Respondent's stipulation through his attorney that there is an absolute stipulation that he does not seek public—to hold public office or to gain further public benefit. There is also the issue of the public's judgment in this matter. We cannot totally overlook the ability of the public to voice its matter in the future. And finally there is the issue of the pension. My opinion would be that the issue of the pension from what I have heard is going to ride separately from the impeachment despite what seems to be an obvious attempt in voting the Articles of Impeachment to subvert or to band that pension. But I heard it stated by Mr. Rish that to the question if he was impeached could he still gain pension benefits and the answer was, I believe, yes, that is still a possibility.

To the subject of the pension benefits, specifically we have in the statutes in the section that I referred to earlier in asking a question, Section 121.091, it is specific as to the offenses which constitute a breach of public trust which would deprive a person of benefits. And they are committing, aiding and abetting any embezzlement or theft from his employers, bribery, unlawful compensation or reward, corruption by threat against a public servant, bribery in athletic context. Now I think it was the clear intention of the Legislature in setting forth that statute that these were the particular offenses that a public officeholder should not commit unless he would jeopardize his pension. And I guess there are very good reasons for that because there would be a number of other crimes or other offenses for which the issue of the pension and whether or not the person was convicted of a felony would be totally unrelated to whether he got his pension. I would further assert that if a number of the allegations or the charges in the Articles of Impeachment are true that they similarly would be grounds for information or indictment and information filed by the State's Attorney that would qualify the person for the deprivation of the benefits under that section of the statutes.

So that we are straining quite a bit, I believe, to make impeachment the vehicle for deprivation of benefits when one, it could come about through the operation of a conviction under this section of the statutes or two, it could come about under the determination of the court of whether or not he was already covered by the conviction in the Federal case. For these reasons, then, I would speak against the motion.

MR. CHIEF JUSTICE: Senator Spicola.

SENATOR SPICOLA: Mr. Chief Justice, Senators, I rise in support of the motion. Senators, as I see it, our role and function sitting as a Court of Impeachment is very broad but within that broad role I think it is our obligation to do justice and I concede to you that that is a nebulous term. I can only tell you what it is not. It is not to do an injustice not only to the Respondent but to the people of Florida. Justice does not have a price tag, either. It is not full justice, in my opinion, if the allegations alleged in the impeachment articles are true for someone to, for the rewards or the penalties, not to fit the acts or crimes alleged.

If this Respondent were to receive the rewards of a pension and were guilty of these acts, that would, in my opinion, be

an injustice and therefore not justice, not only to the other subscribers to the pension fund but to the people of Florida because certainly that would be against public policy and what we except as common decency.

So I would ask you to accept the jurisdiction in this case.

MR. CHIEF JUSTICE: Senator Tobiassen.

SENATOR TOBIASSEN: Mr. Chief Justice, could I just ask a question? I'm really undecided on it. Could I ask Mr. Jacobs a question or if not, then I will ask the lawyer members of the Senate. I will state my question first. Maybe I could just ask the lawyer members. I'm a little confused about this. Apparently a Federal Court has convicted Judge Smith and now he is appealing that conviction and so I assume that by appealing the conviction he has appealed it because he feels he is innocent.

But you go back to the time that he was accused of committing the crimes and he resigned his judgeship. Now if he knew he were innocent at that time, why would he resign his judgeship because you look at any elected official from time to time accused of different things and if every time someone is accused of something, I don't feel they should resign if they know they're innocent and can prove their innocence, they would not resign the position. So why would Judge Smith resign his position as judge and now he has been convicted by the Federal Court, appealed the conviction on the assumption, I guess he has, that he is innocent?

MR. CHIEF JUSTICE: Senator Tobiassen, I think you're going to have to listen to some of the comments. The matter concerning—let me say one thing on the matter of law that I think I can do, whether it's a disciplinary matter or whether it's a matter of impeachment.

The matter about whether an individual is convicted or not convicted of an offense does not in and of itself make a determination of one or the other proceedings. Now it has been made as one of the Articles of Impeachment the conviction of a crime. That's a matter that the House has to prove. But as far as the other facts and circumstances, it is not dependent upon the conviction for this Court of Impeachment to proceed. Senator Zinkil.

SENATOR ZINKIL: I would like to speak to Senator Hair's motion. Number one, I think that when Senator Ware asked the question about had he been convicted of a felony under some of the statutes he forgot to ask about Chapter 838. I believe in the first Article conviction of a felony, I think that would have been under 838 and it would have been convictable in the State of Florida.

I think under the second Article the conspiracy to unlawfully obtain and the distribution of approximately 1500 pounds of marijuana was touched upon by Senator Glisson. I think that's something we should listen to. Under the third one, attempted bribery of officers of the State of Florida to influence in the performance of their official duties, I believe this is one that we should hear testimony to and we should find out.

Under the third, subverting the judicial process, I think we should hear testimony and find out and wait on that. And the fourth, conduct unbecoming a judicial officer resulting in lowering the esteem of the judiciary is serious and I believe that the Judicial Qualifications Commission would probably listen and rule on that at a later date.

At the present time our hands are tied by the Court at New Orleans having invoked the rule.

Mr. Chief Justice and members of the Senate sitting as a Court of Impeachment, I think we should deny the motion to

dismiss and I think we should proceed and try this on its merits. I know we're going to have to wait until such time as we can get the necessary witnesses and I know that this is going to cost money. However, we have a duty to perform, we have a responsibility to the citizens of the State and if the Respondent is found not guilty, we have a responsibility to him and his family to rule.

I think we would be very improper at this time to dismiss. I think we should proceed so that this can be found and if the Respondent is not guilty, if we find that, then we should clear him of the stigma of the charges. But if he is guilty, then, members of this Court, we should so find and answer to the citizens of the State with a proper ruling at that time. I urge that we support the motion of Senator Hair.

MR. CHIEF JUSTICE: Senator Gordon.

SENATOR GORDON: Mr. Chief Justice, I noticed in your explanation of the law that you said that the pension was an emolument of the State and I maybe need some help from Senator Sayler on this because he knows about pensions, but it's my understanding that a pension, proper pension plan, would say that if somebody accepted retirement at whatever age, then the funds that are in the pension plan are considered to be adequate to provide the benefits provided for in the contract which would mean that from the point of resignation to the point at which contributions stopped, the point of which he no longer receives a salary and is no longer making a contribution or the State making a contribution that no more money would go into the fund to fund those benefits; they would have to end at that point just like if you reach the age 65 and you don't put any more in, the State doesn't put any more in and whatever dollars are there is what funds the pension.

Under those circumstances if I am being accurate about it, then I would have to question whether in fact there was any emolument and really the only money then that you would have to say was coming from the State was from that period from which the alleged acts took place to the time of which Judge Smith resigned. Anything that happened before that we have to assume on the presumption of innocence that he was a proper judicial official and he certainly would be entitled not only to his money but the contributions made during those—that period of time prior to any acts of which later led to his conviction. And under those circumstances, Mr. Justice, I'm not sure that I would have to agree with you that that was an emolument of office. And if I am correct then I think it's rather pointless to go through a trial situation and I think we would be much better off to say yes, we have jurisdiction but as a practical matter Senator Chamberlin's analysis of the statute, let the statute operate on its pension to whatever extent and why bother to go through a whole other trial which will have no effect at the end?

But the real point is whether in fact we are able to take away any emoluments since the money for his pension is in the fund and is accrued primarily at a time in which nobody has alleged he did anything wrong.

MR. CHIEF JUSTICE: Senator Barron.

SENATOR BARRON: I would like to make a substitute motion. A substitute motion that the Senate sitting as a Court of Impeachment does have jurisdiction.

MR. CHIEF JUSTICE: Senator Barron, we went back over the rules, you know, the rules committee did not adopt Rule 7.3 concerning the matters of amendments and substitute motions.

SENATOR PLANTE: Mr. Chief Justice, if I might, we did adopt Rule 6 and Rule 6 is the one dealing with motions. In Rule 6 it says when a motion is under consideration prior to

the commencement of the vote a substitute motion shall be in order. We did adopt Rule 30, Rule Number 1, 5, 6, 8 and 10 of the Florida Senate shall apply. So far as they're not in conflict. But other rules we have adopted.

MR. CHIEF JUSTICE: All right. I will rule that it is in order. Proceed.

SENATOR PLANTE: Before we debate, can I make a motion dealing with adjournment?

MR. CHIEF JUSTICE: Yes.

SENATOR PLANTE: I move that the time of adjournment be extended until 2:00 o'clock.

MR. CHIEF JUSTICE: You have heard the motion. All in favor signify by saying aye.

THE SENATE: Aye.

MR. CHIEF JUSTICE: The motion carries.

SENATOR BARRON: Mr. Chief Justice and members of the Senate, I submit to you that we really don't at this point in the proceedings know what we are doing. I submit to you that we ought to decide that we have jurisdiction in this case and I submit to you further that we should adjourn, we are not going to take testimony today and ponder the motion that has been filed by the Respondent and come back at whatever time the Chief Justice and the President of the Senate decide, I think they have that jurisdiction, and then when we are not at the end of a man-killing session and maybe a little bit pressured, read the briefs and act responsibly on this very, very, very serious matter.

Probably the most important decision that you will ever make in your lifetime, only time in the history of Florida will you have an opportunity to make that decision. I don't think we should make it frivolously, because at stake here is whether any chief executive can pick and choose among the people that he wants to accept a resignation and those who he wants the Senate of Florida to prosecute, Senator Zinkil. Not to kill, that's not our job, not to sentence, that's not our job, not to give away or take away pension, that's not our job.

The Constitution says we can do one of two things or we can do two things. We can acquit, remove or remove with the understanding that the person can no longer hold public office.

Now the accused's attorney stood up there a moment ago and said that he will enter into any kind of an agreement that's binding with the House of Representatives that the man will never seek public office again. I'm not sure that I would make that agreement. I think the people should make that agreement, but they have said that they would make it. He is presently a convicted felon. He has suffered all of the indignities that he can suffer. According to the medical records he is in bad physical condition.

Now if you want to penalize him, if you want to drive him into the ground, if you want to further embarrass his family, if you want the stories to emanate from this Senate about his conviction and what he did so we can all read it again, we read it once when it came out down in the State, we're reading it again now in the appeal. I submit to you that that is not our prerogative. We are not here to make those kind of decisions. And I ask you why it is that the Cabinet members of Florida admitting impropriety in office were not brought before the Senate of Florida and paraded all of that nor were they brought before the courts.

I submit to you that the only reason we are here is to keep a person who wants to hold his office and is guilty of wrong

doing from holding that office. The man has done all he can do. He has resigned. He is not drawing salary. You are going to worry about the pension. You want to know where the pension is going to go? In my judgment if this conviction sticks, it will probably go to his wife and children. He will be somewhere in the Federal prison. But we are not to decide that, either.

But why the Senate wants to sit here today and make a quick judgment that we are going to put the Senate of Florida, the President told me a while ago that if it lasts 10 days it will be \$300,000. I submit to you it's going to last a lot longer than that. Mr. Rish talked about how quickly they did things in the House. They did it over there because they were only telling one side of the story, that was the prosecuting attorney, but here I'm the only man that's been through one of these things and we will be here a while and we should be here a while if there is any sense, any reason or any logic to it.

The very purpose for which we are here has already been served and that purpose is to keep the man from being in office and the rendering of opinions and administering justice and he's out of office. I would urge you to vote that yes, we have jurisdiction and then we are going to adjourn and then come back and let's all take a good, long hard look at it.

MR. CHIEF JUSTICE: Senator Barron, what was the substitute motion?

SENATOR BARRON: That the Senate make a finding that we do in fact have jurisdiction and Judge, you have talked and said that is the question before us.

MR. CHIEF JUSTICE: That is correct. That would be—Senator Barron, if I understand, if the Senate does in fact have jurisdiction, that's what you're saying?

SENATOR BARRON: Yes, sir.

MR. CHIEF JUSTICE: Then that would be in accordance with the motion that has been made by Senator Hair.

SENATOR BARRON: No, Mr. Chief Justice, I tried to disagree with you earlier on that point because the motion, read it, it's a motion to dismiss and one of the—many of the grounds, one that he is no longer an officer and the other is that he has been convicted of a felony and those are the four things—the three things that we got into. The motion has been limited to that and the jurisdictional matter in Section 4 down there so I want to move that we have jurisdiction.

MR. CHIEF JUSTICE: Senator Barron, I have ruled the matter of Section 4 goes to the matter of the adequacy of counsel in this proceeding and the matter of due process. Sections 1, 2 and 3 are the matters that go to the jurisdiction as I read the motion of this Senate to proceed in these matters. And the issue that is now before the Senate on the motion of Senator Hair is that we deny the motion to dismiss as it pertains to the grounds attacking the jurisdiction of this Court of Impeachment to proceed on the merits of this cause.

SENATOR BARRON: Would you let me read them, Judge? "Comes now the Respondent Samuel S. Smith by and through his undersigned counsel appearing especially in his behalf and moves the Senate sitting as a Court of Impeachment to dismiss the Articles of Impeachment heretofore filed in and for the grounds the Respondent has resigned from his office of Circuit Judge and is no longer an officer subject to impeachment under the Constitution of Florida. The Respondent was removed from office upon his conviction of a Federal offense which constitutes a felony and is no longer an officer subject to impeachment. The Respondent retired from his office as

Circuit Judge on February 15, 1977 and is no longer an officer subject to impeachment."

Now I want to say that he is an officer subject to impeachment and that we have jurisdiction. If that's the question of jurisdiction but I don't want to be compelled to dismiss the charges, the complaint—the motion this morning. I just want to have an understanding that we have jurisdiction and if that passes, then I will move to adjourn and we will come back and the motion will still be before us.

MR. CHIEF JUSTICE: Just one minute. Senator Barron, as I understand the motion, the motion that is now before the Senate, it's on those three grounds and it's on the basis of those three grounds that it is asserted that this Senate cannot proceed further in these matters. The motion that has been made by Senator Hair only goes to the matter of these three grounds and the fact that this Senate does have jurisdiction to proceed on the merits.

SENATOR BARRON: Well, then, I would make the motion, Your Honor, that we temporarily pass the motion until we get back into session whenever we set it and after that I would make a motion that we adjourn so that we can study the motion in the interim.

MR. CHIEF JUSTICE: All right, Senators. You have heard the motion that we temporarily pass—Senator McClain?

SENATOR MCCLAIN: Mr. Chief Justice, if we hold that we have jurisdiction does that forever foreclose any argument to the contrary? I always thought that jurisdiction was always available to be raised.

MR. CHIEF JUSTICE: Senator, in my reading of the proceedings where resignations had been submitted before and the issue had been raised before I can assure you that it was subsequently raised on the floor of the United States Senate as it concerns that issue. Senator Hair.

SENATOR HAIR: Senators, I would just like to speak against the motion to temporarily pass. We're not making a quick decision here today, we have been here arguing about this matter for four hours and you have had the briefs on your desk, some of you, since yesterday and you have had time to study them, study the law that we have had recommendations by the Chief Justice and I think we ought to be in a position now to vote on the motions that are before us. So I would urge you to defeat Senator Barron's substitute motion.

MR. CHIEF JUSTICE: Senator Gordon.

SENATOR GORDON: I wonder if Senator Barron would yield and take the floor for a couple of questions. I want to see if I understand, Senator, what you're proposing. If I understand what you're saying is that you would rather have us say we have jurisdiction and not deny this motion which would tend to foreclose the argument on each one of those three points being made further; is that what is bothering you?

SENATOR BARRON: What is bothering me is that we have received all of this information last night and I submit that nobody here has read it and couldn't possibly have had time. But the motions are very, very serious and that we should not take those up this morning. That we do have jurisdiction, we are going to come back and this would still be pending. We could take it up when we get back and I don't know what will happen to the man in the meantime but at that time I would argue strenuously and I hope with more information that maybe the motion should be denied. But right now we just want to temporarily pass it and get out of here and we will still be in the Court of Impeachment, we will not adjourn from the Court of Impeachment, we will adjourn upon the call of the Chief Justice.

MR. CHIEF JUSTICE: Senator Thomas.

SENATOR PAT THOMAS: Just a point of inquiry. The motion to adjourn being of a higher priority, wouldn't it, and if it were offered and it could pass, would it not leave us in the posture with that motion still pending?

SENATOR BARRON: Yes. If we adjourn without considering it, yes, that would be another way of doing it, Senator.

MR. CHIEF JUSTICE: Senator Johnston.

SENATOR JOHNSTON: Mr. Chief Justice, Senators, briefly speaking against the motion. Senator Hair has a Special Committee on Rules and we are on a time schedule here and I know it's very serious, Senator Barron, but we have got to realize that once these Articles of Impeachment have come down from the House it's now in our lap and to use Senator Childers' phrase, we have either got to fish or cut bait. We have got to start fishing this morning.

Now we have heard this for four hours now and the sole question before us is do we have jurisdiction or don't we have jurisdiction and that is couched in the terms of a motion to dismiss. So the question before us is do we grant the motion to dismiss or do we deny it? Senator Hair's original motion is that we deny it for the first three grounds which are couched in the terms of jurisdiction.

Now I think we have got to get this thing going and so I strongly urge you to vote against the motion to temporarily pass and get back on track and then vote for Senator Hair's motion.

SENATOR BARRON: Will the Senator yield?

SENATOR JOHNSTON: Certainly.

SENATOR BARRON: But if we do that, Senator, we still will have before us when we come back the questions that we might want to address whether or not we will want to proceed with this impeachment if the person is no longer in office.

SENATOR JOHNSTON: No, we will not. I don't think we will have that question, Senator Barron. I think that's part of the jurisdictional question that we have got to decide. I think we should decide it right now. You know, we can't get in here and argue the merits of the case, we can't go and talk to the camera and everything else like that. They came down with Articles of Impeachment. We've either got to act or not act and we have got to start right now on it.

MR. CHIEF JUSTICE: Senators, you have before you a motion to temporarily pass, the effect of the motion is to leave that matter pending before this Court of Impeachment. The Clerk will please unlock the machine. The Senators will vote.

The vote was:

Yeas—9

Barron	Gallen	Thomas, Pat	Trask
Chamberlin	Gordon	Tobiassen	
Childers, W. D.	Scarborough		

Nays—26

Brantley	Henderson	Peterson	Spicola
Childers, Don	Holloway	Plante	Vogt
Dunn	Johnston	Poston	Ware
Glisson	Lewis	Renick	Wilson
Gorman	MacKay	Sayler	Zinkil
Graham	McClain	Scott	
Hair	Myers	Skinner	

Vote after roll call:

Yea to Nay—Gallen

MR. CHIEF JUSTICE: Have all Senators voted? The Clerk will lock the machine and announce the vote.

THE SECRETARY: 9 yeas, 26 nays.

MR. CHIEF JUSTICE: The motion to temporarily pass fails. The matter recurs on the motion of Senator Hair. Any further discussion? Senator Dunn.

SENATOR DUNN: To the motion, in support of the motion. A lot has been said today about the question of whether or not resignation would have the effect of divesting the Senate of jurisdiction. I think we ought to address the issues as they were raised in the motion and the first one is that resignation issue.

Two things occur to me. First of all, there is a dialogue between some of the House Managers or the House Manager, principal Manager, and counsel here, with some of the Senators to the effect of stare decisis with regard to prior Supreme Court rulings. I say you need not get to that.

The Statutes of Florida at the time this officer chose to resign required that the resignation be accepted by the Governor. That statute was passed by the House and Senate, as a matter of fact it was my bill, and I wrote that section. It was written specifically to address the Spector case and to bring Florida law in accordance with the constitutional common law that had existed, existed at least back in 1939.

Now I submit as the questions were posed here to Mr. Jacobs might have indicated that the whole question of whether or not we have jurisdiction is not related to whether or not the public officer has resigned or whether or not the public officer has in fact been retired. I agree wholeheartedly with the opinion of the legal advisor, the Chief Justice of the Florida Supreme Court, that that is not necessary. Because if you read the Constitution, if you read the Constitution, the contrary result from that point would say that the Senate could be divested of its constitutional jurisdiction by the unilateral act of a public officer. We could never get to the question of whether or not that officer could be precluded from serving in public office again. The question of forfeiture could never be raised. We would be forestopped in our effort to address that constitutional remedy.

Now, Senators, I think the question before you today is very, very simple. I agree with Senator Barron we do have jurisdiction. We have jurisdiction of the subject matter and jurisdiction of the person, of Judge Sam Smith. We can act constitutionally. The question is whether we want to act, period. The question is does this Senate want to take action in impeachment trials against this public officer in view of the facts as we know them?

Now why should we not act? Well, as is suggested by some Senators that it would cost a lot of money were we to go to an impeachment trial. It's been suggested that it might even be \$300,000 if we went through a full trial. That may well be the case. And Senators, it's going to cost that public official or individual as you may choose to denominate him now, it's going to cost him a lot of money to defend it and in the final result maybe the State of Florida is going to end up paying both bills. But I submit to you regardless of who pays the cost of prosecution, regardless of whom pays the cost of defense, justice has no price tag. We have a constitutional duty, that duty must be performed, as I see it, in this case even if it costs money, even if it costs \$300,000.

Were we to say that the cost of prosecution, the mere cost of prosecutions is ground not to prosecute, we are inviting our State Attorneys, we are inviting the executive branch to turn their backs on criminal conduct, turn their backs on crim-

inal conducts because they don't have money. I have been advised that they're working the floor, we are supposedly losing votes so I ought to cut it short. I don't care if they are working the floor and I don't care what the final result is, I know how I'm going to vote and it's going to be in accordance with my conscience and I'm not particularly concerned about working the floor for or against this matter. I'm not even sure it's appropriate to do that. I think every Senator has their own conscience and I would hope everybody here does.

Now to conclude my remarks, the first argument against exercising jurisdiction is the cost. The second argument against it is that humanitarian concern for the judge. I share in the humanitarian statement of Senator Barron about this impeached public officer. I share a humanitarian concern with regard to criminals who are brought before the bar of justice just before they are sentenced or just as they walk in the courtroom to be tried. But just because we have a humanitarian concern does not mean that we are not called upon under the Constitution to do our duty.

Now one of the arguments in favor of exercising jurisdiction, the arguments in favor are these. Number one, if we exercise jurisdiction we can assure constitutionally if conviction is had and if the Senate chooses to do it that this public officer having been convicted of one or more of the Articles does not serve in public office again in the State of Florida. If we don't exercise jurisdiction, Senators, we cannot really be sure of that. I submit to you that there is no precedent for a voluntary waiver in futuro of the right to hold public office. Can you sit down at your desk and waive your constitutional right to vote in the future and be bound by it? I submit no.

Secondly, the other argument in favor of exercising jurisdiction is a very powerful one. It relates to the question of impeachment. There is no doubt in anybody's mind in this chamber and outside the chamber that the issue here is whether or not this gentlemen behind me will in fact be entitled to his benefits under the retirement system, even though the retirement system says if you are impeached by the Senate, you shall not get those benefits.

Now it seems to me that the ball is in our court. Either we are going to be attuned to the wishes of the people in this State who said through the Sunshine Amendment that a public office is a public trust and that the people have a right to enforce the preservation of that trust. Now either we are going to be their instruments and help the people of this State enforce the Sunshine Amendment against a person who is brought to this point under charges of a rather serious nature. Either we are going to respond in an admirable and acceptable way or we are not. We are going to go down politically and be responsive to our electorate forum. I choose not to go back to my district and tell them that I chose not to take a constitutional action here today that I think is appropriate and I think most of them would think it's appropriate.

Now, Senators, I think the issue is clear. You either want to go forward with this action or you don't. And if you don't want to go forward with the action it's not because we don't have jurisdiction. Everybody of any repute in this chamber has said and admitted that we had jurisdiction. The question is, Senators, do you want to exercise jurisdiction in this case? I hope you would agree with me that it is appropriate in this case that we do that and in all deference to the sensibilities and the family of this public officer, we ought to do it.

MR. CHIEF JUSTICE: Senator MacKay.

SENATOR MACKAY: I agree with most of what Senator Dunn has just said. I think it's clear that we have jurisdiction.

I think though that there are two avenues open under Florida law today when you reach this situation. One is for the man to be tried and convicted in the State court of one of the enumerated crimes and that is a possibility that has not even been started. It would seem to me that that is the most appropriate way to resolve this and I suggest that the way this debate has gone this morning it shows that we are not a forum under which this Respondent has a real assurance of due process of law. And I think given that—given that kind of consideration, the Senate, knowing that it has jurisdiction should not exercise jurisdiction and we should say back to the Governor, the chief law enforcement officer of this state, you have a decision to make, this is going to come up from now on and we want the precedent to be that the man is tried and convicted in a State court and thus loses his pension benefits and that we don't have to be a court every time this comes up.

So I hope that there is some way we can stop at this point without setting any precedent that indicates that we don't think we have jurisdiction. I just think it's not appropriate for us to be exercising that jurisdiction when there is an avenue open and that everyone understands and we're not having to fool around with precedents that aren't clear in making our own precedents and I think the court system is the appropriate way to dispose of this.

MR. CHIEF JUSTICE: Senator Myers.

SENATOR MYERS: Mr. Chief Justice, following Senator MacKay's remarks in which I fully concur I think the best avenue to arrive at that situation would be to now adjourn these proceedings. And I therefore, sir, move that we do now adjourn until the call of the court.

SENATE PRESIDENT BRANTLEY: I don't think Senator Myers really wants to do that which he just said. If you adjourn period you adjourn. Now you might want to consider the modification of that motion. You recess or you adjourn pending a call by—

SENATOR MYERS: That's what I added, Senator Brantley. I—that we adjourn until the call of the court.

MR. CHIEF JUSTICE: Until the call of the court?

SENATOR MYERS: Well, at the call of the presiding officer, I'm talking about the Chief Justice, to the call of the presiding officer. I guess you could say that we recess.

MR. CHIEF JUSTICE: All right, gentlemen, before I put the motion, let me—you know you have created by report that you have adopted at the last session of this court, the President of the Senate, the Chairman of the Rules and Calendar, the Chairman of the Special Rules Committee and the Chief Justice to set the period of time as to when this court would convene on the merits if and when that particular time was necessary. As I understand your motion, Senator Myers, it's to recess to a time to be set by that process?

SENATOR MYERS: That is correct.

MR. CHIEF JUSTICE: And so that the Senate would understand what the effect of the motion is, if you adopt the motion, it leaves pending this issue as it pertains to the jurisdiction to proceed in this matter. It does not resolve it. It's a matter for the Senate to determine. As I understand it is not debatable; is it, Senator Hair?

The Clerk will unlock the machine. The Senators will vote. The Clerk will lock the machine and announce the vote.

The vote was:

Yeas—15

Barron	Holloway	Scarborough	Tobiasen
Chamberlin	Lewis	Scott	Trask
Childers, W. D.	MacKay	Skinner	Vogt
Gordon	Myers	Thomas, Pat	

Nays—20

Brantley	Gorman	McClain	Sayler
Childers, Don	Graham	Peterson	Spicola
Dunn	Hair	Plante	Ware
Gallen	Henderson	Poston	Wilson
Glisson	Johnston	Renick	Zinkil

THE SECRETARY: 15 yeas, 20 nays.

MR. CHIEF JUSTICE: The motion fails. Senator Plante.

SENATOR PLANTE: If I could, just a couple of comments. It would seem, and I know that the motion to adjourn is going to keep coming up and it's going to get closer to passing, we all get hungry and we all get tired and we would all like to go home. But it seems to me it would be an irresponsible act not to make a decision today and to set some time in the future, a month or two months or even three months away of a definite time for trial. Then after all of the work of both sides and all of the expense of preparing for that trial come back and at that time and then vote not to take this matter up and that we don't have jurisdiction would be really a waste of a lot of taxpayers' dollars. I really think we ought to sit here and either make that decision today one way or the other. If we say we don't have jurisdiction and we're not going to go forward then we don't. If we do, then we go forth. But not waste everybody's time over the next two or three months before we come back.

MR. CHIEF JUSTICE: Senator Holloway.

SENATOR HOLLOWAY: I hate to do something that I have never seen done in the Senate but I want to call for the previous question. We didn't adopt Rule 11.1 under this Senate sitting as a Court of Impeachment and I think the motion is in order.

MR. CHIEF JUSTICE: Senator Plante.

SENATOR PLANTE: Mr. Chief Justice, we have adopted the rules of the Senate I think if I can get to them again, 1, 5, 6, 8, 10 and then these rules and that motion is not in the rules that we have adopted. If the motion is not in the rules that we have adopted, it's not available. Even though there is not a prohibition against it it is not in our rules that that motion may be made.

MR. CHIEF JUSTICE: The Chair is going to rule that I'm not going to accept that motion, Senator Holloway, at this time. I think the matter concerning the issues that are before the Court of Impeachment that I do feel that the members of the Court should have an opportunity to express themselves if they so desire. I would suggest, however, that you have to remember that there are 40 people here and—anything further?

The matter recurs on the motion by Senator Hair. Senator Wilson.

SENATOR WILSON: May I be recognized to speak to the motion, please?

MR. CHIEF JUSTICE: Yes.

SENATOR WILSON: I do it with some trepidation referring back to Senator Dunn's remarks when he said that everyone here of any repute has agreed that we have jurisdiction. So I run the risk of being one perhaps of ill repute if I am not in agreement. I have been trying to resolve that because that is the question before us. Do we or do we not have jurisdiction, no matter how the motion is phrased?

I would like to point out a couple of things that in my mind the jurisdictional question resides in the bottom line of is this person an officer, in office or not? And not being an officer of the court, a lawyer or what have you, maybe I have less respect or am less intimidated, I should say, from the past by some of the lawyers interpretations or by the instructions from the Chief Justice.

I have read the cases in our briefs and one thing I am now convinced of is that the lawyers can't agree and the courts can't agree. And so beyond that it's sort of back to common sense.

Now Senator Dunn suggested that if we did not accept jurisdiction we would be allowing a public official to act unilaterally and subvert impeachment processes forever, certainly in this case. I would suggest that if we hold the truth to the fact that a resignation must be accepted by the Governor and if you say that the Governor may act willy-nilly, take it from one and not take it from another, you are also placing a unilateral decision in the hands of one person. So it's just a question of whose ox is being gored, which person gets that unilateral decision. Is it going to be the Governor, is it going to be that elected official?

So I'm not convinced, Senator Dunn, by that argument. I also am a member of the Executive Business Committee and I have served on that committee for two years and Chapter 114 which added the words "submitting the resignation and acceptance by the Governor" was Committee Substitute for Senate Bill 53 and that was passed on April the 7th, 1977 and it was by the Committee on Executive Business and Senator Dunn.

Now although my memory might be a little hazy on this I have sat as a member of that Committee during all of this time and at this time that this bill was passed, I do not remember missing a meeting last year in that Committee. This rewrite of Chapter 114, if you compare the 1975 statute book to the 1977 statute book and compare the journal you will see that it certainly wasn't headlined that this resignation issue was the substance of that bill. And I can testify as a member of that Committee, based on my best memory, that that or how it would relate to Spector, Senator Dunn, was never discussed. And I don't think it was ever discussed on the floor of this Senate. It goes far beyond what was the '75 statute but it deals with a whole lot of other things. It's now a two-page chapter instead of a one-page chapter.

So the crux of whether or not we have jurisdiction, in my mind, is whether or not this person is an officer because under the Constitution of the State of Florida I don't believe the Senate has jurisdiction to impeach private citizens contrary to Representative Rish and contrary to perhaps the Chief Justice. And I hope we never do because the people of this State will never be safe from the politicians if we ever get to that point.

I don't subscribe to the fact that we are still living under a 1700 English common law. We are a United States and we fought revolutions over getting out from under those laws. So we do have the right to establish our own laws.

I don't believe the legislative intent was to give the Governor, the present Governor, future Governors, the arbitrary right to accept or not accept a resignation. I think that language was put in there, it was a work of art, it was there to clarify a ministerial and procedural function and that is the crux of this matter. And as far as I am concerned if I resigned and I abandoned the office and I say it's effective and irrevocable then I have resigned and I don't think that if I resign under those conditions and Senator Dunn resigns under those conditions that the Governor of this State has the right to say I accept Senator Dunn's resignation but I don't accept yours. And then you get into the involuntary servitude question.

So, Senators and Mr. Chief Justice, to me and my vote is going to rest on this jurisdictional matter as to whether or not this person has resigned from office, whether or not he is still in office and if so, then he would be under the jurisdiction of this Senate. So therein I'm at this point inclined absent some other argument to oppose the motion by Senator Hair.

MR. CHIEF JUSTICE: Senator Scarborough.

SENATOR SCARBOROUGH: Mr. Chief Justice, I want to make a few comments about the whole affair here today. I had some misgivings as to whether or not the Senate had jurisdiction in this matter and I have resolved in my mind from hearing the debate and your questions of law that we do in fact have jurisdiction. But I keep coming back to the bottom line question which everyone has tiptoed around and that question is why are we really here?

Now are we naive enough to believe that we're really here sitting as a Court of Impeachment to impeach Judge Smith so that he can never hold another elected public office? Is there anyone, anyone naive enough to believe that what has happened to him in the past few months that he could ever be elected to dog catcher? Now we all know the answer to that. It's just as clear as anything in the world.

The bottom line question as to why we are here is because the Governor has decided that the only way to stop Judge Smith, in this case, or it could be anybody, from receiving his retirement benefits is through the impeachment process, nothing more, nothing less.

Now the House Managers earlier admitted before some testimony that it is, quote, questionable as to whether or not even if we impeach Judge Smith that that will in effect stop his retirement benefits.

Now to the Governor, I suggest that the proper course for him to have pursued was not through the impeachment process to stop the pension benefits but simply to direct, which he has the authority to do, the Division of Retirement to go to the courts of the State of Florida and get an answer as to whether or not Judge Smith will be entitled to retirement benefits.

So we are going to adopt in the motion to deny but I don't want you or me or the press or the media of Florida to go back to our constituents and say the Senate is on the road to denying retirement benefits for a convicted public official because even if we do what I am sure we are going to do that question will be resolved by the courts.

One final point. The fact that a speech was made in New York 300 years ago by a distinguished American that stated that an official, public official, who's been impeached shall not receive any emoluments, I don't think is going to impress anybody today. So those, I hope, words will be transported around Florida, we have not by our actions today done what the Governor has led the people of Florida to believe we are going to do. Nothing further.

MR. CHIEF JUSTICE: Anything further? There being nothing further, it recurs on the motion of Senator Hair. If you support the motion which is to deny the motion to dismiss the effect of that motion is to take jurisdiction of this cause and to hear this matter on the merits. If so, you would vote yes. If you desire to grant the motion to dismiss, you will vote no. You have heard the motion, the Clerk will unlock the machine. The Senators will vote. Have all Senators voted? The Clerk will lock the machine and announce the vote.

The vote was:

Yeas—29

Brantley	Hair	Plante	Tobiassen
Childers, Don	Henderson	Poston	Trask
Childers, W. D.	Holloway	Renick	Vogt
Dunn	Johnston	Scarborough	Ware
Gallen	Lewis	Scott	Zinkil
Glisson	McClain	Skinner	
Gorman	Myers	Spicola	
Graham	Peterson	Thomas, Pat	

Nays—6

Barron	Gordon	Williamson	Wilson
Chamberlin	MacKay		

THE SECRETARY: 29 yeas, 6 nays.

MR. CHIEF JUSTICE: The motion is adopted.

SENATOR BARRON: Mr. Chief Justice?

MR. CHIEF JUSTICE: Senator Barron.

SENATOR BARRON: I believe that at any time we can move to dismiss from the floor—

MR. CHIEF JUSTICE: Senator, I feel that—

SENATOR BARRON: I suggest to you that's the way it's going to happen finally when we get down the road.

MR. CHIEF JUSTICE: Senator, that motion, as you well know, this Senate is the Court and it has that prerogative. At this time with reference to the matter concerning the due process rights and the matter of counsel the Chair would like to recognize Senator Hair.

SENATOR HAIR: Mr. Chief Justice and Senators, the Special Committee on Impeachment met yesterday to consider the selection of the trial date and some other matters relating to Judge Smith and you have received a copy of our report which is on your desk.

I would like to mention with reference to the question of counsel that we contacted—this was pursuant to our Committee request—the Tallahassee Legal Aid Foundation, the Florida Bar and the Department of Legal Affairs all with reference to providing counsel to Judge Smith, all of them respectfully declined to furnish legal representation to him. We have attached copies of that report, those letters to the report that I have submitted.

The Committee also contacted the Legal Services of North Florida, Inc. and other persons within the legal profession to try to obtain counsel for Judge Smith. We talked with them yesterday at the Committee meeting and I talked today with Mr. Jack McClean who is the Executive Director of the Legal Services of North Florida, Inc. and he has indicated to me that if the Senate asks them, asks his group to provide legal counsel to Judge Smith that his group, that his association will provide representation for Judge Smith in this matter.

I also would like to report that we have been in contact through Mr. Tony Cunningham and with Mr. Ron Cacciatore who is the Chairman of the Florida Bar Criminal Law Section, he is the former president of the Hillsborough County Bar Association and experienced trial lawyer in criminal matters in Hillsborough County. He also has indicated to us that he would be willing to represent Judge Smith in this matter providing we give him certain expense money and I have contacted Senator Brantley and those matters can be worked out.

So I would like to report to you, Mr. Chief Justice that at this time we do have the Committee, it has been able to determine from two sources and I have talked to both of them personally today, expressing their willingness to represent Judge Smith in this matter.

On that basis, Your Honor, I would like to at this time make a motion regarding the matter of counsel. I would like to move first that the Senate sitting as a Court of Impeachment do formally request at this time that the Legal Services of North Florida, Inc. furnish counsel to Judge Smith in these proceedings and that we also notify Judge Smith that he should contact you as to whether or not he will accept representation by Legal Services of North Florida, Inc. or by Mr. Ron Cacciatore or whether he will furnish his own counsel to represent him in this matter and would like to request that that information be furnished to you by June 2 which is next Friday in that regard.

MR. CHIEF JUSTICE: Senator Hair, before I put that motion, let me hear, if I might, from Mr. Jacobs. Do you have anything that you desire to offer before I put that motion for discussion?

MR. JACOBS: No, sir. With the exception of the fact that I contacted the lawyers, all the lawyers that have participated in the case for Mr. Smith up to today and Mr. Brecher, the attorney that is trying the case in New Orleans expressed an interest in being contacted, possibly being contacted for that and everyone else that I contacted was not available.

MR. CHIEF JUSTICE: All right. As you heard the motion from Senator Hair, it was also predicated on the fact that I as the presiding officer be advised as to who in effect was representing the Respondent a week from today; does that meet with your approval?

MR. JACOBS: Yes, sir. I'm sure we can get a report to Your Honor by Friday, a week from Friday.

MR. CHIEF JUSTICE: Senator Brantley.

SENATE PRESIDENT BRANTLEY: Mr. Chief Justice, I want to simply make an expression on those alternatives that are being offered to Judge Smith. I agree with them. Senator Hair did discuss them with me. I, however, find being presiding officer and called upon to affix my signature to any expenditure of public funds, I think it only appropriate to put it in the record that before I intend to affix my signature to expenditures of any public funds I'm going to have to be more satisfied as to indigency than the mere finding of other members of the House of Representatives.

MR. CHIEF JUSTICE: As I understand as far as the representation, Senator Hair, by counsel, there would be no matter of compensation for services. That is not involved. Is that correct?

SENATOR HAIR: That is correct.

MR. CHIEF JUSTICE: All right. Senator Scarborough.

SENATOR SCARBOROUGH: Just for observation, Mr. Chief Justice. When Senator Dunn was speaking a moment ago he, I hope in levity, made a statement that the floor was being lobbied. Senator, I would like to correct you on that. You know and everybody knows I'm the chief unofficial floor lobbyist in the Senate and I was seated right next to Senator Hair during the entire proceedings and nobody is lobbying anybody on this very serious matter.

MR. CHIEF JUSTICE: All right, the record will so reflect.

MR. CHIEF JUSTICE: All right. You have heard the motion by Senator Hair. The Clerk will unlock the machine. Have all Senators voted? The Clerk will lock the machine and announce the vote.

The vote was:

Yeas—29

Brantley	Childers, Don	Dunn	Glisson
Chamberlin	Childers, W. D.	Gallen	Gorman

Graham	McClain	Scarborough	Ware
Hair	Myers	Scott	Wilson
Henderson	Peterson	Skinner	Zinkil
Holloway	Plante	Spicola	
Johnston	Poston	Thomas, Pat	
Lewis	Renick	Tobiassen	

Nays—None

THE SECRETARY: 29 yeas, no nays.

MR. CHIEF JUSTICE: The motion carries. It is so ordered. I will recognize Senator Hair for a motion relating to the matter of the trial on the merits.

SENATOR HAIR: Senators, again yesterday we had a meeting with our Committee and as all of you know the trial in New Orleans has been recessed now until June the 5th and there has been some indication that the trial may last for another—could last for two weeks or could last until the middle of July. And because of that we did not feel that it would be wise at this time for us to set a trial date because if we do it would be safe to say the end of July. That means we have got to come back up here at that time and then recess and set another trial date. And the Committee on that basis would like to recommend, I will make this in the form of a motion, this was the recommendation connoted in the report, that the Senate President and the Chief Justice, this Chairman of the Special Committee on Impeachment Rules and the Chairman on the Senate Committee on Rules and Calendar shall be authorized to set a trial date to commence the impeachment proceedings. And I would like to say in passing that there was concern yesterday that some of you may have some problems about certain dates that we might select and I can only say from my standpoint that I think that we ought to consult with all the Senators about problems they might have and I certainly think we would take that matter into consideration. So on that basis I would like to move that these—move that motion, Mr. Chief Justice.

MR. CHIEF JUSTICE: You have heard the motion by Senator Hair. Is there any discussion? There being no discussion, the Clerk will please unlock the machine and the Senators will please vote. Have all Senators voted? The Clerk will lock the machine and announce the vote.

The vote was:

Yeas—30

Barron	Gorman	Myers	Spicola
Brantley	Graham	Peterson	Thomas, Pat
Chamberlin	Hair	Plante	Tobiassen
Childers, Don	Henderson	Poston	Ware
Childers, W. D.	Holloway	Renick	Wilson
Dunn	Johnston	Scarborough	Zinkil
Gallen	Lewis	Scott	
Glisson	McClain	Skinner	

Nays—None

THE SECRETARY: 30 yeas and no nays.

MR. CHIEF JUSTICE: The motion carries and it is so ordered.

The Journal of May 12 was corrected and approved.

MR. CHIEF JUSTICE: Senators, this concludes the proceedings. This Court is now in recess as directed by your last motion. The Senate is now in recess.

Whereupon, the Senate, sitting as a Court of Impeachment, adjourned at 1:43 p.m. to reconvene on a date set by the President of the Senate, the Chief Justice, the Chairman of the Special Committee on Impeachment Rules and the Chairman of the Senate Committee on Rules and Calendar.